

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 FEDERAL HOUSING FINANCE AGENCY,

4 Plaintiff,

5 v.

6 JPMORGAN CHASE & CO., INC., et al.,

7 Defendants;

8  
9 And other FHFA cases.

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11 CV 5201 (DLC)  
11 CV 6188 (DLC)  
11 CV 6189 (DLC)  
11 CV 6190 (DLC)  
11 CV 6192 (DLC)  
11 CV 6193 (DLC)  
11 CV 6195 (DLC)  
11 CV 6196 (DLC)  
11 CV 6198 (DLC)  
11 CV 6200 (DLC)  
11 CV 6201 (DLC)  
11 CV 6202 (DLC)  
11 CV 6739 (DLC)  
11 CV 6203 (DLC)  
11 CV 6739 (DLC)  
11 CV 7010 (DLC)  
11 CV 7048 (DLC)  
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New York, N.Y.  
October 15, 2012  
2:30 p.m.

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13 Before:

14 HON. DENISE COTE,

15 District Judge  
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## APPEARANCES

QUINN EMANUEL URQUHART & SULLIVAN LLP

Attorneys for Plaintiff

Federal Housing Finance Agency

BY: PHILIPPE Z. SELENDY, ESQ.

MANISHA M. SHETH, ESQ.

CHRISTINE H. CHUNG, ESQ.

SASCHA RAND, ESQ.

JULIA GUARAGNA BESKIN, ESQ.

ADAM M. ABENSOHN, ESQ.

FEDERAL HOUSING FINANCE AGENCY

BY: STEPHEN E. HART, ESQ.

Managing Associate General Counsel

KASOWITZ BENSON TORRES & FRIEDMAN LLP

Attorneys for Plaintiff

Federal Housing Finance Agency

BY: KANCHANA WANGKEO LEUNG, ESQ.

CHRISTOPHER P. JOHNSON, ESQ.

MICHAEL HANIN, ESQ.

ANDREW K. GLENN, ESQ.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Attorneys for Defendants UBS Americas Inc.,

SG Americas, Inc., and

affiliated entities and individuals

BY: ROBERT A. FUMERTON, ESQ.

JAY B. KASNER, ESQ.

SCOTT D. MUSOFF, ESQ.

JOSEPH N. SACCA, ESQ.

SPEARS & IMES LLP

Attorneys for Defendants UBS Americas Inc.,

BY: DAVID SPEARS, ESQ.

MONICA P. FOLCH, ESQ.

SULLIVAN & CROMWELL LLP

Attorneys for Defendant JP Morgan Chase

and affiliated entities, and certain individuals

BY: PENNY SHANE, ESQ.

SHARON L. NELLES, ESQ.

JONATHAN M. SEDLAK, ESQ.

1 APPEARANCES (Cont'd)

2 SULLIVAN & CROMWELL LLP

Attorneys for Defendant Goldman Sachs  
and affiliated entities and individuals

3 BY: RICHARD H. KLAPPER, ESQ.

4 THEODORE EDELMAN, ESQ.

W. RUDOLPH KLEYTEUBER IV, ESQ.

5 BRADLEY A. HARSCH, ESQ.

6 SULLIVAN & CROMWELL LLP

Attorneys for Defendant Barclays Bank  
and affiliated entities and individuals

7 BY: DAVID H. BRAFF, ESQ.

8 BRIAN T. FRAWLEY, ESQ.

9 SULLIVAN & CROMWELL LLP

Attorneys for Defendant First Horizon,  
Nomura Holding, and affiliated entities

10 BY: BRUCE E. CLARK, ESQ.

11 AMANDA F. DAVIDOFF, ESQ.

12 PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Attorneys for Defendant Citigroup  
and affiliated entities and individuals

13 BY: SUSANNA M. BUERGEL, ESQ.

14 CAITLIN E. GRUSAUSKAS, ESQ.

15 BRUCE BIRENBOIM, ESQ.

16 CRAVATH, SWAINE & MOORE LLP

Attorneys for Defendant Credit Suisse  
and affiliated entities and individuals

17 BY: RICHARD W. CLARY, ESQ.

18 LAUREN A. MOSKOWITZ, ESQ.

19 DEWEY PEGNO & KRAMARSY LLP

Attorneys for for Credit Suisse

20 BY: KEARA A. BERGIN, ESQ.

21 SIMPSON THACHER & BARTLETT LLP

Attorneys for Defendants RBS Securities,  
Deutsche Bank, and affiliated entities

22 BY: DAVID J. WOLL, ESQ.

23 THOMAS C. RICE, ESQ.

24

25

1 APPEARANCES (Cont'd)

2 MAYER BROWN LLP

Attorneys for Defendant HSBC North America Holdings  
and affiliated entities and individuals

3 BY: JOHN M. CONLON, ESQ.

4 MICHAEL O. WARE, ESQ.

ALLISON J. ZOLOT, ESQ.

5 JENNIFER M. ROSA, ESQ.

6 MAYER BROWN LLP

Attorneys for Defendants Ally Financial  
and GMAC Mortgage Group, Inc.

7 BY: REGINALD R. GOEKE, ESQ.

8 MICHAEL O. WARE, ESQ.

CATHERINE A. BERNARD, ESQ.

9 KIRKLAND & ELLIS LLP

Attorneys for Defendant Ally Securities

10 BY: ROBERT J. KOPECKY, ESQ.

11 WILLIAMS & CONNOLLY, LLP

Attorneys for Defendants Bank of America Corporation,  
Merrill Lynch, and affiliated entities

12 BY: BETH A. STEWART, ESQ.

13 EDWARD J. BENNETT, ESQ.

14 LAUREN K. COLLOGAN, ESQ.

15 DAVIS POLK & WARDWELL LLP

Attorneys for Defendant Morgan Stanley  
and affiliated entities and individuals

16 BY: JAMES P. ROUHANDEH, ESQ.

17 BRIAN S. WEINSTEIN, ESQ.

DANIEL J. SCHWARTZ, ESQ.

18 WEIL, GOTSHAL & MANGES LLP

Attorneys for Defendant General Electric  
and affiliated entities

19 BY: GREG A. DANILOW, ESQ.

20 VERNON S. BRODERICK, ESQ.

21 SETH GOODCHILD, ESQ.

22 RICHARDS KIBBE & ORBE, LLP

Attorneys for Numerous Individual Defendants

23 BY: DANIEL ZINMAN, ESQ.

24 ALLEN & OVERY LLP

Attorneys for Defendant Molinaro

25 BY: JOSEPHINE A. CHEATHAM, ESQ.

1 APPEARANCES (Cont'd)

2 GREENBERG TRAURIG, LLP  
Attorneys for Defendant Mayer  
3 BY: RONALD D. LEFTON, ESQ.

4 MORRISON & FOERSTER LLP  
Attorneys for Defendants Marano & Nierenberg  
5 BY: JOEL C. HAIMS, ESQ.

6 SNR DENTON US LLP  
Attorneys for Defendant Perkins  
7 BY: PATRICK E. FITZMAURICE, ESQ.

8 KRAMER LEVIN NAFTALIS & FRANKEL, LLP  
Attorneys for Defendant Verschleiser  
9 BY: DANI R. JAMES, ESQ.

10  
11 (In open court)

12 THE CLERK: In the matter of Federal Housing Finance  
13 Agency v. UBS Americas Inc. and others, and other FHFA cases,  
14 for plaintiff Federal Housing Finance Agency, are you ready to  
15 proceed?

16 MR. SELENDY: Yes, we are. Thank you.

17 THE CLERK: Please state your name for the record.

18 MR. SELENDY: Philippe Selendy, Quinn Emanuel, for  
19 FHFA.

20 MS. CHUNG: Christine Chung with Quinn Emanuel for  
21 FHFA. Good afternoon, your Honor.

22 MS. SHETH: Good afternoon. Manisha Sheth for FHFA.

23 MR. RAND: Good afternoon, your Honor. Sascha Rand,  
24 Quinn Emanuel, for FHFA.

25 MR. ABENSOHN: Good afternoon, your Honor, Adam

1 Abensohn for FHFA.

2 MR. HART: Good afternoon, your Honor. Steve Hart  
3 with FHFA.

4 MS. LEUNG: Good afternoon, your Honor. Kanchana  
5 Leung with Kasowitz Benson for FHFA.

6 MR. GLENN: Andrew Glenn, Kasowitz Benson, on behalf  
7 of FHFA.

8 MR. JOHNSON: Christopher Johnson from Kasowitz Benson  
9 for FHFA.

10 MR. HANIN: Michael Hanin, Kasowitz Benson, for FHFA.

11 THE CLERK: Counsel, just to make sure your names are  
12 included on the appearance sheet.

13 THE COURT: One minute, Ms. Rojas.

14 THE CLERK: For defendants UBS Americas Inc. and SG  
15 America, please state your name for the record.

16 MR. KASNER: Your Honor, good afternoon. Jay Kasner,  
17 Robert Fumerton, and Scott Musoff from Skadden Arps.

18 MR. SPEARS: And, your Honor, David Spears and Monica  
19 Folch are working with Skadden Arps on behalf of UBS on these  
20 matters.

21 THE CLERK: For defendant JP Morgan Chase & Co.

22 MS. SHANE: Good afternoon, your Honor. Penny Shane,  
23 Sullivan & Cromwell, with Sharon Nelles and Jonathan Sedlak,  
24 also from Sullivan & Cromwell.

25 THE CLERK: For defendant Goldman Sachs.

1 MR. KLAPPER: Good afternoon, your Honor. Richard  
2 Klapper from Sullivan & Cromwell, along with my partner,  
3 Theodore Edelman.

4 THE CLERK: For defendant Barclays Bank.

5 MR. BRAFF: Good afternoon. David Braff from Sullivan  
6 & Cromwell with Brian Frawley, also of Sullivan & Cromwell.

7 THE CLERK: For defendants First Horizon National  
8 Corp. and Nomura Holding America.

9 MR. CLARK: Good afternoon, your Honor. Bruce Clark  
10 and Amanda Davidoff, Sullivan & Cromwell.

11 THE CLERK: For defendant Citigroup Global.

12 MR. BIRENBOIM: Good afternoon, your Honor. Bruce  
13 Birenboim, Susanna Buergel, and Caitlin Grusauskas from Paul  
14 Weiss for the Citigroup defendants.

15 THE CLERK: For defendant Credit Suisse Securities.

16 MR. CLARY: Good afternoon, your Honor. Richard Clary  
17 and Lauren Moskowitz from Cravath Swaine & Moore.

18 MS. BERGIN: Keara Bergin, Dewey Pegno & Kramarsky,  
19 also for Credit Suisse.

20 THE CLERK: For defendant RBS Securities and Deutsche  
21 Bank.

22 MR. WOLL: Good afternoon, your Honor. David Woll and  
23 Tom Rice from Simpson Thacher.

24 THE CLERK: For defendant HSBC North America Holdings.

25 MR. CONLON: Good afternoon, your Honor. John Conlon

1 and Michael Ware of Mayer Brown.

2 THE CLERK: For defendants Ally Financial and GMAC  
3 Mortgage Group.

4 MR. GOEKE: Good afternoon, your Honor. Reginald  
5 Goeke, Michael Ware, and Catherine Bernard of Mayer Brown.

6 THE CLERK: For defendant Ally Securities LLC.

7 MR. KOPECKY: Good afternoon, your Honor. Robert  
8 Kopecky, Kirkland Ellis.

9 THE CLERK: For defendants Bank of America and Merrill  
10 Lynch.

11 MS. STEWART: Good afternoon, your Honor. Beth  
12 Stewart from William & Connolly, and with me today are Ted  
13 Bennett and Lauren Collogan.

14 THE CLERK: For defendants Morgan Stanley.

15 MR. ROUHANDEH: Good afternoon, your Honor. Jim  
16 Rouhandeh, Brian Weinstein, and Daniel Schwartz from Davis  
17 Polk.

18 THE CLERK: For defendants General Electric.

19 MR. DANILOW: Good afternoon, your Honor. Greg  
20 Danilow, Vernon Broderick, and Seth Goodchild from Weil  
21 Gotshal.

22 THE CLERK: For the individual defendants including  
23 George C. Carp.

24 MR. ZINMAN: Good afternoon, your Honor. Daniel  
25 Zinman from Richards Kibbe & Orbe.



1 THE CLERK: For the individual defendant Jeffrey  
2 Mayer.

3 MR. LEFTON: Ronald Lefton from Greenberg Traurig.

4 THE CLERK: For the defendant individual Samuel  
5 Molinaro Jr.

6 MS. CHEATHAM: Good afternoon, your Honor. Josephine  
7 Cheatham from Allen & Overy.

8 THE CLERK: For the individual defendants Thomas  
9 Marano.

10 MR. HAIMS: Good afternoon, your Honor. Bill Haims,  
11 Morrison & Foerster.

12 THE CLERK: For the defendant individual Matthew  
13 Perkins.

14 MR. MORRIS: Good afternoon, your Honor. Patrick  
15 Fitzmaurice, SNR Denton.

16 THE CLERK: And for the individual defendant Jeffrey  
17 Verschleiser.

18 MR. JAMES: Good afternoon, your Honor. Dani James  
19 from Kramer Levin.

20 THE COURT: Thank you.

21 Welcome, everyone. And I appreciate your cooperation  
22 in being here on such short notice. It just seemed to me,  
23 given the letters I received late last week, that it would be  
24 impossible for me to work through all the items that were  
25 raised by that exchange of correspondence through a telephone

1 conference, or at least difficult to accomplish.

2           So let me tell you what I have on our agenda today,  
3 and counsel may have additional issues. I want to address the  
4 issues raised to those three sets of letters. I want to talk  
5 about the *Daubert* motion practice. I want to see if we can fit  
6 in some summary judgment motion schedule dates in the UBS case.  
7 I want to talk about the coordination in the RBS case, Royal  
8 Bank of Scotland, with the Connecticut action. I want to  
9 address the ResCap loan file production issue. I want to talk  
10 about the schedule for reports by the plaintiff and the  
11 defendants on reunderwriting in the UBS action and potentially  
12 in other actions.

13           I want to talk about loan file production from true  
14 third parties. This comes up, obviously, in the sets of the  
15 three letters, but whether we're moving towards the point where  
16 motions to compel are necessary or appropriate with respect to  
17 any of those subpoenas that have been issued.

18           Good. So that's my list, and I want to thank counsel  
19 for the reports that you exchanged this morning. I haven't  
20 looked at them in detail, but I did look at them a bit.

21           I thought we might start by talking about some of the  
22 issues raised in the letters. The plaintiff's letter was  
23 labeled "Loan File Production." The first specific issue it  
24 raised was loan numbers for loans that were reviewed as part of  
25 the defendants' due diligence and are referred to by the

1 plaintiff with the term "due diligence samples." And I think  
2 there were least five issues raised in that letter and its  
3 responsive letter.

4 For many of the issues that came to me through these  
5 three sets of letters, the defendants indicated there was a  
6 need for further opportunity to meet and confer, and I issued  
7 an order requiring the parties to do that. So for some of the  
8 issues raised in this first set of letters, I realize you may  
9 have made some progress and the issues may be a little  
10 different now than was presented to me. So why don't I take a  
11 report with respect to these issues and then we'll resolve  
12 hopefully any outstanding disputes.

13 MR. SELENDY: OK. Your Honor, Philippe Selendy for  
14 FHFA. Would you like me to address all the issues in that  
15 letter or just focus on the due diligence question?

16 THE COURT: Well, so many of these issues are  
17 interrelated. Whatever you think is the most efficient way to  
18 do it.

19 MR. SELENDY: OK. Well, I can report that progress  
20 has been made on some of the issues. In particular, as your  
21 Honor will recall, we had sought to request defendants to  
22 prioritize the production of loans that fall within the samples  
23 designated by Dr.~Cowan. And it is my understanding that the  
24 defendants, notwithstanding the submission originally from UBS,  
25 they have now agreed to prioritize those samples. And I think

1 that is an agreement that efforts will be made to secure the  
2 production from third parties of loans in the sample population  
3 and to ensure prioritization from defendants themselves.

4 That's not the case with respect to the defendants'  
5 due diligence files. And so your Honor is clear, those are the  
6 files that we understand defendants assert they reviewed not  
7 for the purposes of a full underwriting but for various tests,  
8 whether it was sent out to third parties or otherwise, in the  
9 course of underwriting the transactions. And we have sought to  
10 request defendants to, first of all, identify what those loans  
11 are out of the populations of the securitizations, and secondly  
12 to similarly prioritize the production.

13 In the letter that came in from Skadden Arps on  
14 October 11, they asserted that we had never raised this issue  
15 before. But your Honor will see from Exhibit 2 to our letter,  
16 this very issue was stated, among other times, in the September  
17 5th letter that we presented to them, asking them to prioritize  
18 due diligence files and also, in footnote 1, page 2 of that  
19 exhibit, to identify the loan numbers of those loans so that  
20 the population is clear.

21 The reason for this is that we understand defendants  
22 are intending to rely upon that population as a key part of  
23 their defense of adequate underwriting, and just as with the  
24 sample populations that we have selected for purposes of  
25 demonstrating representativeness across all populations, we

1 would like the opportunity to be able to reunderwrite those  
2 loans and determine whether in fact they demonstrated  
3 compliance with the various representations or not. So we are  
4 at an impasse on that point.

5 THE COURT: Let me interrupt, sorry, and ask a  
6 question. Is it helpful to think about loan files as falling  
7 within three categories: loan files that the defendants possess  
8 as defendants, loan files that the defendants possess as third  
9 parties, and loan files that true third parties possess?

10 With respect to the first two categories, I think the  
11 report I got suggests that all the loan files that defendants  
12 have, either as parties or as third parties, have already been  
13 produced or will be produced shortly. And I want to put aside  
14 for one moment the 100,000 files for JP Morgan Chase in  
15 Louisiana. Let's just put those aside. They're a separate  
16 issue.

17 So with respect to true third parties which have -- I  
18 don't know, I'm getting slightly different numbers -- but maybe  
19 half a million loan files in the possession of true third  
20 parties -- and these are people who have subpoenas, many of  
21 them which require production be complete in August, not every  
22 one, but many. But let's talk about one of those true third  
23 parties. And I'm glad we have some people who are deeply  
24 involved in loan production pursuant to subpoena in this  
25 courtroom. I wonder if it really makes sense to prioritize

1 production of loan files, either the FHFA samples or the due  
2 diligence loans. It seemed to me that some of the subpoenas  
3 that were served, and the fundamental argument presented by  
4 FHFA, was that besides requesting loan files, the subpoenas  
5 requested, for instance, e-discovery, communications with FHFA  
6 or concerning FHFA. And if a party receiving the subpoena had  
7 many tasks to perform besides production of loan files, they  
8 may be delayed in their production because they had to, in  
9 their mind, fulfill all those tasks. I don't know the answer  
10 to this question, but if we ultimately are going to want all  
11 the loan files from a party and all their underwriting  
12 guidelines, don't we want to prioritize the loan files and  
13 underwriting guidelines, and the rest of the issues, about  
14 electronic discovery, e-mail searches, about relevant  
15 communications, that could come in a second production, as  
16 opposed to having piecemeal production and searching for and  
17 production of loan files? I hope my question is clear enough.

18 MR. SELENDY: OK. So let me take the last issue that  
19 you raised first, your Honor. We do agree, the most important  
20 category of information from third parties will be the loan  
21 files as well as the guidelines that relate to those loans.  
22 And it does make sense to prioritize them as a category. We  
23 had, for example, issues with defendants seeking single  
24 family-related information from those third parties and  
25 increasing the burden on frankly irrelevant areas or areas that

1 this Court already ruled were not appropriate for discovery. I  
2 think we've reached some agreement on curtailing that, as well  
3 as, I believe, on prioritization of loan files and guidelines.  
4 And that is critical.

5 To date, in fact, we have had limited reports of what  
6 information has come from the third parties until this morning.  
7 We had understood that only 14 of these third parties had  
8 actually produced loan files.

9 In the joint letter that was submitted this morning,  
10 it looks as if a much greater volume has been produced, but  
11 that has not yet made it across to us.

12 THE COURT: Excuse me one second. (Pause)

13 MR. SELENDY: OK. Just to continue, there is, we  
14 understand, for certain of these third-party entities -- and  
15 this is based on our own communications with originators and  
16 others -- there are burden issues such as it may be simpler to  
17 produce on a timely basis a subset of all the loan files. I  
18 think that varies according to how the files are maintained.  
19 And we have made efforts to identify both the specific loans in  
20 the samples and the categories of due diligence to the extent  
21 that will facilitate a faster production.

22 So I think, in answer to your question, it may vary  
23 entity by entity as to whether, for that entity, it is an  
24 easier pathway to produce all the loan files and guidelines or  
25 to sort within them and produce a subset.

1           In terms of the requirements for us in ultimately  
2     getting to the reunderwriting of loans, the most important  
3     category of those in the samples and the due diligence  
4     populations.

5           THE COURT: I ordered on September 4 that the parties  
6     meet and confer at least every two weeks on the status of loan  
7     file production. Have you been having those meetings on that  
8     regular basis?

9           MR. SELENDY: That's why I referred your Honor to the  
10    September 5th letter in which we requested the biweekly  
11    meetings of defendants. The stay then came in the way of that.  
12    And no defendant was willing to meet with us during the  
13    pendency of the stay. We have resumed discussions with  
14    defendants in this regard. And we remain very willing to  
15    identify any mechanism to simplify the collection of files.

16          To date, our concern is that notwithstanding the  
17    volume of subpoenas that defendants have served, a very small  
18    percentage of those files have actually made their way back to  
19    FHFA. It's an immediate concern, a pressing one. We can't  
20    satisfy the strict deadlines that we have here for trials, much  
21    less the reunderwriting, unless those files come in. And  
22    that's why we sought the assistance of the Court.

23          THE COURT: OK. So you just got this report at 10 or  
24    so this morning. I don't expect you to have analyzed it with  
25    care, much less met and conferred with the defendants about it.



1 I'll hear from defense counsel in a moment, but assuming that  
2 defendants agree that with respect to any third-party subpoenas  
3 that have been served they are willing to prioritize the  
4 production of loan files and underwriting guidelines even if  
5 they have sought additional categories of information, and for  
6 institutions that have received subpoenas where they would find  
7 it possible to prioritize further the production of the FHFA  
8 samples and the due diligence samples, that the defendants are  
9 willing to make that request as well, and that the parties will  
10 regularly, the plaintiff and defendants will regularly confer  
11 about the status of those productions, and if any party thinks  
12 that someone is not sufficiently focused on the need to get  
13 these materials, the loans and underwriting guidelines,  
14 produced, that they discuss with each other whether or not it  
15 is now ripe for a motion to compel and whether or not they have  
16 agreement on that they will feel free to come to me and talk  
17 about whether it is now ripe for a motion to compel. Obviously  
18 if the subpoenaed is someone that I have control of within the  
19 Southern District of New York, that simplifies it. That's one.  
20 I'll hear from the defendants if we have agreement on that.  
21 But that sounds like it would meet the requirements of the  
22 plaintiff.

23 MR. SELENDY: Your Honor, depending upon the timing --  
24 and just to give your Honor some perspective of that -- as of  
25 today, if we look at the numbers, in the, for example, in the

1 Goldman Sachs deals in the supporting loan groups, there are  
2 82,000 loan files. I believe to date we received 547 loan  
3 files. If we look at Credit Suisse, there are 100 --

4 THE COURT: I'm sorry. You're looking at Exhibit A to  
5 the defendants' report.

6 MR. SELENDY: Yes, that's correct.

7 THE COURT: And so what did you just say?

8 MR. SELENDY: I said if you look at Goldman Sachs, for  
9 example, 547 loan files have been produced, out of 82,000 loan  
10 files in the supporting loan groups. If you look at Credit  
11 Suisse, they've only --

12 THE COURT: Wait one minute. OK. Well --

13 MR. SELENDY: My point is that the timing of this is  
14 critical, and if in fact efforts are made and agreements are  
15 reached with third parties to produce files within a matter of  
16 weeks as opposed to months or several months, that is very  
17 useful to us. We've not been a part of the discussion between  
18 defendants and those third parties, and we are looking for that  
19 confirmation.

20 It also matters how those files are produced. To date  
21 defendants have not been willing to, for example, Bates-stamp  
22 the productions, even by electronic file, a single Bates number  
23 for the whole file. Nor have they been willing, for the most  
24 part, to identify which loans correspond to which  
25 securitizations so they can be readily tracked and processed by

1 us. When you're dealing with volumes in the hundreds of  
2 millions, it's essential to do that. And in fact FHFA has done  
3 that for its entire production.

4 THE COURT: Excuse me, counsel. Could you be seated.

5 MS. STEWART: Sorry, your Honor.

6 MR. SELENDY: So it needs to be done as part of a  
7 comprehensive effort in which there's a timely production  
8 properly categorized, Bates-stamped, and made just as FHFA has  
9 made that production to defendants. If we have agreement from  
10 defendants on that, then I think that would address this part  
11 as to the sampling, although we still have due diligence files.

12 THE COURT: Mr. Selendy, I outlined -- and I hope the  
13 defendants are going to agree to it, but I will give them an  
14 opportunity to be heard. So the issue is whether or not, right  
15 now, the plaintiff agrees, OK. So I understand you to be  
16 agreeing with what I outlined.

17 MR. SELENDY: That's correct.

18 THE COURT: OK. And so this is going to put a burden  
19 on the plaintiff to be in daily communication with defense  
20 counsel, now you have this report, identifying where the  
21 problems lie with what I'll call these true third parties  
22 talking about what's being done, whether more needs to be done,  
23 including applications to this Court. OK.

24 You moved on to another topic, which was fine, which  
25 was the Bates-stamping and, as I think you described it, the

1 manifests. And you saw in today's submission of October 15th  
2 the defendants' report on loan file production. Their position  
3 with respect to the manifests, which was that you had, sadly,  
4 only a draft stipulation, which I take it was never finalized,  
5 but no agreement with respect to, as I understand it from the  
6 defendants' report today, no agreement with respect to the form  
7 in which these loan files would be produced other than what  
8 might be reflected in this, I guess the latest draft was  
9 October 5th.

10 So as I understand it, you now want, in addition to  
11 what the parties had agreed to as of October 5th,  
12 identification by loan, by securitization, and with Bates  
13 numbers.

14 MR. SELENDY: Yes, your Honor. And to be clear, it  
15 has been our understanding throughout that all parties would  
16 produce loan files in a way that identified to which  
17 securitizations they corresponded, and to indicate in the  
18 production where the loan file begins and ends. That's not  
19 something that can be determined if you have, for example, 50  
20 million pages. You can't determine which pages correspond to  
21 which loan files and which loan files go to which  
22 securitizations in all instances. Sometimes there are  
23 inconsistencies between the same pages for the same loan file.  
24 Sometimes they're missing pages. And sometimes we can't  
25 identify which securitization a loan ultimately went into.

1           So that's information that is available to defendants  
2 and should be made part of the production.

3           THE COURT: OK. Well, let's talk about that. Again,  
4 looking at loan files in these three categories: loan files  
5 that a defendant is producing as a defendant, loan files where  
6 the defendant is producing as a third party but from its own  
7 files or those of its affiliates, and loan files produced from  
8 true third parties pursuant to subpoena. Now, are you  
9 representing to me that you had agreement with the defendants  
10 with respect to these production issues for any of those three  
11 categories?

12           MR. SELENDY: Clearly we did not. We were operating  
13 under an understanding that loan files would be produced as I  
14 have outlined, and clearly we have not had agreement. And  
15 that, as we have looked at the production and as we have  
16 requested these steps, we've been rebuffed, and it's perfectly  
17 apparent there is no agreement on that.

18           THE COURT: OK. So with respect to productions from  
19 true third parties who have not yet made a production, it seems  
20 to me, since by and large these are the defendants' subpoenas,  
21 to the extent that they could request production in a certain  
22 way that would not burden the producing party, that's something  
23 you can talk about with the defendants. With respect to the  
24 production by the defendants themselves of loan files that are  
25 under their custody and control, either as parties or as third

1 parties, it seems to me that's a different conversation. It  
2 seems to me that everybody is going to need to have  
3 Bates-stamped copies, at least of the file, so people can refer  
4 to it and manage it. And did you have a meet-and-confer about  
5 this and have you exhausted that process?

6 MR. SELENDY: My colleague, Ms. Sheth, will address  
7 the meet-and-confer.

8 MS. SHETH: Yes, your Honor. With regard to the party  
9 production of loan file documents, the answer is yes. And that  
10 was the extensive negotiations that occurred with regard to the  
11 draft loan files stipulation or the discovery. And part of  
12 that discussion involved whether or not those files should be  
13 Bates-stamped, whether there should be a beginning and an end  
14 Bates number that identified the beginning and end of each  
15 Bates number, and also various either metadata or field data  
16 that would accompany the loan file production so that we could  
17 identify among other things the securitization. But  
18 unfortunately that was never resolved and the discussions of  
19 that loan file stipulation have gone on many months without  
20 resolution.

21 THE COURT: So you have no agreement with the  
22 defendants with respect -- have you exhausted the  
23 meet-and-confer process with respect to this issue, for all  
24 three categories of loan files?

25 MS. SHETH: I don't believe that we have with regard

1 to the parties' productions. I know that there were still  
2 ongoing communications on that front. As to the third-party  
3 production, that has been as a separate carve-out from the loan  
4 file stipulation.

5 THE COURT: And have you exhausted that  
6 meet-and-confer process?

7 MS. SHETH: No, your Honor, we have not.

8 THE COURT: OK. So this issue is not ripe for me  
9 today. I would like you to exhaust that meet-and-confer  
10 process this week. And I'll get you some time. I'm available  
11 hopefully on Thursday for any unresolved issue on that score.

12 MR. SELENDY: Thank you, your Honor.

13 THE COURT: I'm not sure I have a sufficient  
14 understanding of what the status is from the plaintiff's point  
15 of view of the identification of the due diligence loans by  
16 loan number. Has that been involved in a meet-and-confer  
17 process?

18 MR. SELENDY: I believe it has, your Honor. My  
19 understanding is that defendants have not agreed to identify  
20 the loan numbers of the due diligence samples or to make a  
21 prioritized production. There may be one or two exceptions,  
22 but in general that is the case.

23 THE COURT: OK. Let's turn to -- well, let's put  
24 aside, then, on this -- I think the last issue I haven't heard  
25 from plaintiffs on is the hundred thousand files in Louisiana.

1 And we'll just address those separately.

2 So who wants to be heard first among the defendants on  
3 the issues I've just discussed with plaintiff's counsel?

4 Ms. Shane.

5 MS. SHANE: Thank you very much, your Honor. Penny  
6 Shane. The status of meet-and-confer discussions on these  
7 topics, I think your Honor had rightly perceived, was unduly  
8 truncated and there is ground to be covered still with respect  
9 to production. And it is very helpful to think about the  
10 issues and the categories your Honor described, where loan  
11 files are being produced as party, as non-party, and then as  
12 true non-parties, because JPM is producing both as parties and  
13 as non-parties and has had some dealings with true non-parties.  
14 We do have a sense of the practicalities that your Honor has  
15 started touching on with respect to whether prioritizing  
16 certain loan numbers out of other loan numbers actually saves  
17 anybody anything in the way of time, and the meet-and-confer  
18 discussions that we've been having with the plaintiffs have  
19 helped to bring everybody along on that topic, the need to be  
20 practical. And so we have reached a very helpful, I think,  
21 agreement that we are fleshing out still about outreach to  
22 non-parties in ways that will take account of their practical  
23 constraints. In responding to the subpoenas, if loan file  
24 numbers can be prioritized by them in way that saves them time  
25 and trouble, we're more than happy to do that. We're more than



1 happy to do that with respect to the samples that FHFA recently  
2 provided to us. For most defendants those sample numbers came  
3 in last week. So it's a list that is fairly fresh for all of  
4 us, but we're pleased to attach it to a communication to true  
5 non-parties and suggest to them that if it would be helpful for  
6 them to focus theirs, we're more than pleased to have them do  
7 that as well. And that agreement would be one that I think  
8 would resolve many of the issues before your Honor.

9           With respect to the due diligence loan numbers, it is  
10 far more complicated, again simply as a practical matter.  
11 While Mr. Selendy sites to a September 5 letter in which  
12 plaintiff put some priority on the due diligence samples as a  
13 production matter, and we responded immediately by trying to  
14 gather those together, generating a list of those loan numbers  
15 is a different exercise. True, the documents will be  
16 sufficient to show it, and the documents are rapidly being  
17 assembled by many of us. And different defendants are  
18 differently situated, your Honor, with respect to the level of  
19 difficulty associated with extracting those numbers. I know it  
20 sounds easy. But depending on whether the due diligence files  
21 resided and how they did or didn't match up to the actual  
22 supporting loans of the securitization, there was not always  
23 perfect matching. The extraction process is one that can be a  
24 challenge. Some defendants may be better situated, and others  
25 will need to do what is essentially an extraction from

1 documents to be produced. I know of no defendant that isn't  
2 planning promptly to complete its production of the documents  
3 sufficient to generate an assessment of what those loan file  
4 numbers would be and to work with plaintiff in attaching those  
5 as well to a communication to the two non-parties indicating,  
6 because plaintiff would like to see them first, that if they  
7 can prioritize practically speaking and it won't slow them down  
8 to have these numbers in hand in making priorities, that also  
9 is fine with defendants.

10 So we have very little in the way of disagreement with  
11 respect to communications of non-parties and how to speed them  
12 along. What is remaining is an underlying disagreement about  
13 who has the task of extracting due diligence loan file numbers  
14 from documents that are being shared with FHFA, where some  
15 judgment may be required about what that final universe looks  
16 like.

17 THE COURT: So are defendants not planning to have a  
18 due diligence defense in these cases?

19 MS. SHANE: We are, your Honor.

20 THE COURT: So you are actually going to want to know  
21 what you did with respect to your due diligence.

22 MS. SHANE: Absolutely, your Honor. And we intend to  
23 collect all loan files, as we have all along. So the  
24 prioritization again, we're perfectly pleased to join in it and  
25 we're pleased to have this set receive that level of attention,

1 if it makes sense for the non-parties. We are in no way  
2 resisting that. It's only a question of getting the  
3 information collected and out through those non-parties.

4 THE COURT: So it seems to me then that the defendant  
5 should have the burden of identifying by loan number the files  
6 on which their due diligence defense is going to rely. So I'll  
7 just ask you to pull that into your meet-and-confer process,  
8 the date by which you can get, individually each defendant can  
9 get those numbers to the plaintiffs.

10 And, again, counsel, I'm here. You have to do the  
11 meet-and-confer work. You have to bring issues to my  
12 attention. I can't do more than that. If there is an  
13 individual defendant in one of these cases that is not relying  
14 on a due diligence defense, then that's just fine. I won't  
15 impose that burden on them, and just tell the plaintiff that  
16 and they can make a decision whether or not they will extract  
17 the files and otherwise pursue a showing at trial with respect  
18 to the due diligence defense.

19 So I take it, Ms. Shane, you are in agreement with the  
20 plaintiff that the meet-and-confer process with respect to  
21 Bates-stamping and manifests and identifying which loan belongs  
22 in which securitization, that that meet-and-confer process is  
23 not exhausted yet.

24 MS. SHANE: I think there could still be benefit to  
25 our meeting and conferring further with each other on those

1 topics, especially trying to keep it straight, which are the  
2 ones that pertain to true non-parties productions and whether  
3 the parties then have an obligation to do something to those  
4 non-parties' productions, as opposed to the ones that have to  
5 do with the ways that the parties are producing.

6 Your Honor, with respect to that latter category, it  
7 has not been identified to us which defendants are not  
8 producing in accordance with the agreement that's nearly an  
9 agreement that we all have been relying on and seeking to  
10 produce pursuant to with respect to our own production. We  
11 have asked plaintiff, Who is not providing you with the linkage  
12 information as contemplated by the agreement? It seems to have  
13 taken on a new name or a new life form in recent letters. But  
14 for JPM at least and to our knowledge other defendants, we have  
15 been relying on the specifications that plaintiffs put out  
16 there and we negotiated in what has been produced in thousands  
17 of loan files all of this time, in accordance with what we  
18 understood to be our obligations, and we understand that other  
19 defendants have too. We have asked the question, who is not  
20 doing it, where is the dispute coming from. And we have not  
21 received an answer to that.

22 THE COURT: Well, what I understood Ms. Sheth to be  
23 saying is -- and Mr. Selendy too -- is that actually there has  
24 been no agreement and this is a new request for more detailed  
25 specification. And that request for additional information on

1 the files needs to be the subject of a meet-and confer process.  
2 Did I misunderstand you, Ms. Sheth?

3 MS. SHETH: No, your Honor. I think your Honor is  
4 correct. I think the distinction is between party productions  
5 of loan files versus third-party productions of loan files.

6 THE COURT: Sorry. I think there are three  
7 categories. So just so I'm clear -- I'm sure you all  
8 understand what you're talking about. But to assist me, what  
9 distinction are you making?

10 MS. SHETH: As to the loan file stipulation, that was  
11 intend to govern party production, so the defendants' and  
12 FHFA's production of loan files.

13 THE COURT: Defendants as defendants or defendants as  
14 defendants and as third parties?

15 MS. SHETH: I don't know if that was actually  
16 specified in this stipulation with that level of specificity.

17 THE COURT: OK. So you have no quarrel with the way  
18 the defendants have produced their loan files either as  
19 defendants or as third-party producers?

20 MS. SHETH: Based on the information that we have at  
21 present, that is correct. There was one issue --

22 THE COURT: So the request you have is that the  
23 defendants make requests of the third parties, the true third  
24 parties, for production in a particular way that would be of  
25 assistance to you.

1 MS. SHETH: That is correct. And FHFA has done the  
2 same with regard to the third-party production it has received.

3 THE COURT: OK. And that is what you're going to have  
4 a meet-and-confer with the defendants about.

5 MS. SHETH: Yes, your Honor.

6 THE COURT: And obviously that request would have to  
7 be framed in a way that would not be overly burdensome on these  
8 true third parties.

9 MS. SHETH: That is correct, your Honor.

10 THE COURT: So if there is a way they can produce the  
11 documents with minimal burden but in a way that would greatly  
12 assist you folks, all the parties in this litigation, you want  
13 defendants to make that request of the true third parties.

14 MS. SHETH: That is correct, your Honor.

15 THE COURT: OK. So you'll meet and confer with the  
16 defendants about that. You'll have agreement or not.

17 MS. SHETH: Yes. And there is one issue I can take  
18 off the table, which was our dispute about JP Morgan's  
19 hard-copy loan origination files. We have met and conferred  
20 about that issue and we understand that JP Morgan has agreed to  
21 image those files, so that is no longer an issue.

22 THE COURT: Ah, Louisiana. Good.

23 So with respect to the letters which I call the due  
24 diligence samples letters, because that's the first items  
25 raised, I think everything is resolved, either by agreement by

1 the parties or by my ruling today except for one issue, which  
2 is going to be subject to a further meet-and-confer, and that  
3 is the request that the plaintiffs would like the defendants to  
4 make of true third parties about the way they should make  
5 production of their loan files. They're going to meet and  
6 confer about that. If you can't resolve it, you'll come back  
7 to me.

8 MS. SHANE: Your Honor, if I may, defendants offered  
9 already and renew the offer to make the request of third  
10 parties that they go ahead and Bates-stamp their productions as  
11 a way of resolving this dispute. Defendants have no problem  
12 with including that request in its communications to third  
13 parties.

14 THE COURT: Great. So you'll meet and confer. If you  
15 have agreement, that's off the table and I never need to hear  
16 about this again.

17 MS. SHANE: Thank you.

18 THE COURT: I thought the next set of letters we might  
19 turn to.

20 MR. FUMERTON: Your Honor.

21 THE COURT: I'm sorry.

22 MR. FUMERTON: Robert Fumerton on behalf of UBS.

23 THE COURT: Yes, Mr. Fumerton.

24 MR. FUMERTON: If I may raise one issue before we  
25 leave the loan file set of letters.

1 THE COURT: Yes.

2 MR. FUMERTON: Defendants have affirmatively requested  
3 that the Court order the plaintiff here to bear its equitable  
4 share of the costs associated with obtaining loan files from  
5 third parties. As your Honor may recall, back in December of  
6 last year, we informed the Court that many defendants,  
7 including my client, UBS, simply do not maintain loan files in  
8 the ordinary course of business. Literally a few short weeks  
9 after the motion to dismiss was decided, defendants, including  
10 the UBS defendants, went out and subpoenaed servicers,  
11 trustees, originators of these loan files. We served a  
12 comprehensive set of requests back in June. And that's the  
13 reason why we've been able to obtain in the UBS action or will  
14 be obtaining by October 22nd the vast majority of loan files.

15 Since early June, we've asked plaintiff to participate  
16 in this process. No one can dispute here that plaintiff is  
17 seeking all of the loan files. They have served a document  
18 request for all the loan files. This morning they provided  
19 your Honor a chart of 379 subpoenas for loan files that they  
20 have served. We ask plaintiff to participate in this process  
21 and let's share the costs. Plaintiff refused to do so. Again,  
22 after your Honor ordered the parties to meet and confer this  
23 past week end on Friday we again raised the issue. Plaintiff  
24 refused.

25 Plaintiff offers two justifications for refusing to



1 participate in the production of materials it claims it needs  
2 to prosecute its claims here. One is sheer delay. Plaintiff  
3 told us, look, unlike defendants that served their third-party  
4 subpoenas right away, plaintiff waited until August to serve a  
5 single subpoena. And the chart they served this morning, they  
6 served 200 subpoenas just last week, months after defendants  
7 served these subpoenas. So plaintiff's reaction is, look,  
8 because defendants were diligent in prosecuting these  
9 subpoenas, because defendants went first, defendants should  
10 bear the full cost. We have a tremendous difficulty explaining  
11 to our client why defendants are bearing this burden all by  
12 themselves. Plaintiff is the party that has the burden of  
13 proof here. Plaintiff is requesting these loan files.

14 THE COURT: Mr. Fumerton, I have great confidence in  
15 you. I think you could explain that to your clients, since it  
16 was their strategy that has gotten us to this point.

17 MR. FUMERTON: As your Honor recognized in the June  
18 13th conference, plaintiff reserved the right to seek loan  
19 files outside of the sample from the very beginning and  
20 plaintiff --

21 THE COURT: And why did they do that?

22 MR. FUMERTON: Why did plaintiff reserve that right?

23 THE COURT: Yes .

24 MR. FUMERTON: Presumably because they weren't  
25 confident enough to rely on a more limited subset.

1 THE COURT: Well, you weren't, as I remember the state  
2 of play here, the plaintiff proposed to the defendants that we  
3 have a sample of files that we all agree that this case, all  
4 these cases would rise or fall based on the sample of files.  
5 They wanted to talk to you about a protocol for creating the  
6 sample and get agreement on that. They wanted that sample  
7 universe to govern basically all the decisions in this case and  
8 substantially reduce the burden of discovery. And as I  
9 remember it, the defendants were unable or unwilling to do so  
10 for reasons that I accepted.

11 Based on the fact that the defendants required  
12 production of all loan files so they could go into the entire  
13 universe of loan files in this case, over a million, over I  
14 think a million point 1, the plaintiffs came back and said,  
15 well, look, if we're going to meet a case in which the  
16 defendants are picking out loans from hither and yon beyond our  
17 sample, we of course reserve the right to similarly go beyond  
18 our sample.

19 Now, that seemed eminently reasonable to me as well.  
20 So your clients made a decision. And I'm not saying it's the  
21 wrong one. But it was an expensive one. They made a very  
22 expensive decision here about how to litigate these cases.  
23 Absolutely within their rights. And as a result, in the June  
24 13th conference, I caved. I had made my request clear in our  
25 prior conferences that I wanted the parties to agree on some

1 sampling protocol and some percentage, small percentage of  
2 loans on which these cases could be litigated. But I  
3 acknowledged the defendants' right not to reach that agreement.

4 Therefore, we are in this very expensive, burdensome  
5 document production, which has enormous ramifications for your  
6 clients, the defendants, the plaintiff, and now third parties.  
7 And the defendants will bear the cost of that.

8 MR. FUMERTON: Your Honor, if I may respond. From the  
9 initial proposal on sampling, plaintiff reserved the right to  
10 go outside or redraw a sample. In the UBS case alone, it has  
11 doubled its sample from the summer, the initial sample it had  
12 proposed.

13 Your Honor, plaintiff refuses even to participate in  
14 the cost sharing for the loan files as part of their sample.  
15 Even accepting your Honor's premise that the defendants are  
16 somehow to blame here, how can defendants bear the cost of the  
17 loan files in plaintiff's own sample which plaintiff claims it  
18 needs to prosecute its claims?

19 What defense is requesting, your Honor, is the  
20 opportunity to brief this issue. We have reached out to  
21 plaintiff, met and conferred with them. They agreed on a  
22 briefing schedule. We could brief them at the end of the week.

23 THE COURT: I don't need a brief on this. And I  
24 think, as I understood those early discussions, the plaintiff  
25 was reserving the right since when we were having these

1 discussions was in the spring to keep modifying their protocol  
2 until they were comfortable that they have properly designed  
3 their sample. And they were willing to rely on their initial  
4 numbers that they gave to me as estimates because they wanted  
5 further time to work with their expert.

6 So, counsel, we don't need a brief. I appreciate the  
7 briefing you've given me, everyone, on the motions to dismiss.  
8 I'm enjoying working through those motions. If I feel I need  
9 to have briefs on anything, I'll make sure to tell you.

10 MR. FUMERTON: And your Honor, just for clarification,  
11 that will then apply also to the loan files in plaintiff's own  
12 sample; defendants have to bear the cost of guesting those loan  
13 files as well?

14 THE COURT: Yes, Mr. Fumerton.

15 MR. FUMERTON: Thank you, your Honor.

16 THE COURT: Thank you.

17 OK. The protective order.

18 So the series of letters that I've labeled the  
19 protective order, the plaintiff has labeled -- I'm sure this is  
20 helpful to you that I've renamed it -- "Defendants' Improper  
21 Third-Party Requests," and it ends with a request by FHFA for a  
22 protective order.

23 So I personally thought this was very related to the  
24 discussion we just had about prioritization. And in my view if  
25 we prioritize the production of the loan files and the

1 underwriting guidelines, then we're doing what we really need  
2 to do for this litigation, for everybody, the plaintiff and  
3 defendants. And if the defendants want additional discovery  
4 from third parties, those third parties have a right to come in  
5 here and seek protective orders. If they do, I'll hear them,  
6 give everybody an opportunity to be heard. But the rulings I  
7 made with respect to production between the parties before me  
8 were in the context of those issues as they arose, not binding  
9 or preventing someone from seeking third-party discovery.

10 So I'll let the plaintiffs be heard here, but I think  
11 that pretty much -- so long as we're able to prioritize the  
12 production of loan files and underwriting guidelines from the  
13 third parties, the fact that the defendants are seeking  
14 additional documents which may slow down and delay production,  
15 I think, is an issue I don't need to concern myself with right  
16 now.

17 Do the plaintiffs want to be heard about anything in  
18 that letter?

19 MS. SHETH: Yes, your Honor. Manisha Sheth on behalf  
20 of FHFA. We actually did meet and confer with the defendants  
21 on this precise issue over the course of Friday as well as this  
22 past weekend. And we're happy to report that as a result of  
23 that meet-and-confer process, we have reached an agreement with  
24 defendants to narrow the scope of their subpoena and decline to  
25 enforce certain of the requests in the subpoena which we found

1 to be very broad in relating to the single-family side. What  
2 we did on, I believe it was Saturday, we identified a specific  
3 request in the originator subpoenas. As your Honor will  
4 recall, the defendants issued subpoenas to various categories  
5 of third parties. One of those categories was originators.  
6 Another was credit-rating agencies, due-diligence firms. There  
7 were also some law firms and consultants involved as well.

8 As to the originator subpoenas, we have reached an  
9 agreement that certain requests, namely, requests 1 through 5  
10 and request no. 9 of the form originator subpoena, will be  
11 included as is, subject to a few modifications as to the term  
12 securitization, and remaining subpoena requests 6, 7, and 8  
13 will not be pursued for enforcement by the defendants.

14 In addition, defendants have agreed to provide a  
15 letter to the third parties notifying them of that agreement.

16 In addition, as part of that letter, the defendants  
17 have agreed to request the third parties to prioritize the loan  
18 files as well as underwriting guidelines over these custodial  
19 or e-mail-type documents.

20 We have recently also reached an agreement as to  
21 timing this morning where defendants have agreed that the  
22 production of loan files by the third parties and underwriting  
23 guidelines should be a rolling production to commence October  
24 29 and to be completed by November 16. So that will help us in  
25 our reunderwriting review of those documents.

1 THE COURT: I'm sorry. Which files are being produced  
2 over that roughly two-week period?

3 MS. SHETH: The loan files and the underwriting  
4 guidelines.

5 THE COURT: From?

6 MS. SHETH: For the FHFA samples.

7 THE COURT: From?

8 MS. SHETH: From third parties.

9 THE COURT: From the true third parties.

10 MS. SHETH: From the true third parties, correct.

11 THE COURT: Nice.

12 MS. SHETH: In addition, what we thought would also  
13 make sense is if the parties were to draft a proposed  
14 stipulation order for the Court's approval. And we are looking  
15 on that. We should have something exchanged today or tomorrow,  
16 and submit that for the Court's approval so that that can also  
17 go to the third parties so that they receive comfort as to the  
18 subpoena, the modified subpoena.

19 That is the process as to the originator subpoenas.  
20 As to the credit-rating agency subpoenas, due diligence  
21 subpoenas, and other remaining subpoenas, we will engage in a  
22 similar process using the same principles.

23 THE COURT: Great. So from the plaintiff's point of  
24 view, is there anything else you need to bring to my attention  
25 for the series of letters which I've labeled the protective

1 order letters?

2 MS. SHETH: No, your Honor.

3 THE COURT: Do the defendants have anything they wish  
4 to raise with respect to the protective order letters.

5 MS. STEWART: Yes, your Honor. I just want to clarify  
6 something. First of all, apologies for standing earlier.

7 THE COURT: Your name?

8 MS. STEWART: Beth Stewart from Williams & Connolly.  
9 I realize I'm tall and probably needlessly distracted you.

10 In any event, what Ms. Sheth has said is basically  
11 correct. We have had a long and fruitful weekend of working  
12 together. We appreciate your Honor's comments about how the  
13 prior rulings had effect or not on the scope of discovery we  
14 are entitled to. But one thing I just wanted to clarify is a  
15 letter we had proposed to send and which I think Ms. Sheth  
16 agreed would tell third parties that if they cannot confirm to  
17 us by a certain date, which I think was October 25, that they  
18 will be unable to produce loan files and underwriting  
19 guidelines by a second date, which I think our most recent  
20 discussion was that day November 15, but Ms. Sheth will please  
21 correct me if I'm wrong, then we reserve the right to enforce  
22 decision with the Court.

23 So I just didn't want to be overrepresented that all  
24 these parties have as of now committed to make that production  
25 by the 16th. It's rather that we share plaintiff's goal of



1 making sure there is a prompt and orderly production of all of  
2 the remaining third-party discovery. And we wanted to have in  
3 place with them a schedule so that they would be aware of what  
4 we expected of them and what steps we might take otherwise.

5 THE COURT: Thank you.

6 MS. STEWART: Thank you.

7 THE COURT: Can I ask you --

8 MS. STEWART: Yes, ma'am.

9 THE COURT: As far as you know, did any defendant  
10 during the period of the stay tell third parties not to keep  
11 working on these issues?

12 MS. STEWART: What defendants did -- and plaintiff was  
13 aware, I think plaintiff actually did the same thing, we  
14 provided notice to all third parties that a stay had been  
15 entered. We did not tell them what they should do about them,  
16 but we did provide them notice that the stay had been lifted  
17 once the stay had been lifted, and I believe plaintiff did the  
18 exact same thing that we did.

19 THE COURT: Thank you so much.

20 Let's move to the third set of letters. I've labeled  
21 these "Compel Discovery From 12 Defendants."

22 So I think I need to ask you if you've made progress  
23 in narrowing the issues in dispute as a result of the  
24 meet-and-confer process.

25 MS. CHUNG: Good afternoon, your Honor. Christine

1 Chung for FHFA. Your Honor, the issues that are live and on  
2 which the parties have reached an impasse are, first, to  
3 identify the letters. So what we call the post-closing  
4 originator search date range issue, there is a slight wrinkle  
5 in that JP Morgan is somewhat differently situated. So I think  
6 they're on the side now. But we have revisited this issue  
7 during a lengthy meet-and-confer on Friday and I think it's  
8 fair to say that we have an impasse on this as to most  
9 defendants if not all.

10 The second issue identified in the letter is the issue  
11 of the date ranges and how they're being run in the pre-closing  
12 period. This is all related to how the originator terms are  
13 being served in the pre-closing period. That issue is also at  
14 an impasse.

15 THE COURT: I'm sorry. I thought you were just  
16 addressing that issue. So what is the distinction between the  
17 two issues?

18 MS. CHUNG: In both cases, your Honor, it involves the  
19 extent to which the originator terms, the originator searches,  
20 so searches about references to originators, particularly  
21 departures from the guidelines etc., repurchase requests,  
22 basically they're originator base searches, so you will be  
23 looking in the e-mails for mentions of originators with  
24 specific reference to the purchasing guidelines. The two  
25 different issues, one is the extent to which the defendants are

1 running those searches in the post-closing period, so  
2 effectively since 2007.

3 The second issued is that some of the defendants are  
4 limiting their date ranges for those searches even in the  
5 pre-closing period. Your Honor, colloquially we've called it  
6 amongst the parties "the bubble issue" because the defendants  
7 are using a four-month window. They're applying a four-month  
8 window around each securitization and searching in the  
9 pre-closing period on a per-securitization basis only the  
10 originators who were involved in that securitization. So those  
11 are the two different -- the originator term is common to both.  
12 They're both date range issues. But one is pre-closing, one is  
13 post-closing. On those I think it's safe to say we have  
14 impasse.

15 On the last issue, which was raised in our letter,  
16 which was the searches that the requests, the document requests  
17 that we made for, in the first instance, deposition  
18 transcripts, witness statements, things that were previously  
19 produced in government investigations or other RMBS litigation,  
20 I think what I would describe there is, I'm reluctant to say  
21 that there is an impasse. We have been talking about this  
22 issue for a very long time and came up at the conference the  
23 last time we were here with a version of this. I don't think  
24 we're at a stage where there is agreement, but I think that  
25 it's not something that is ripe for the Court at this time.

1 But I welcome different views.

2 THE COURT: Ms. Chung, couple questions. Have the  
3 plaintiffs sought and been given lists of litigations and  
4 investigations regarding private-label securitizations?

5 MS. CHUNG: Your Honor, we have. And in fact, there  
6 is one easy list that we referred the defendants to in the last  
7 meet-and-confer, which is that the complaints themselves, as  
8 your Honor knows, contain many references to PLS litigation,  
9 RMBS litigation, government investigations, CIC reports, SEC  
10 investigations that we have already identified that in our  
11 view, in the complaints, are relevant because we have alleged  
12 systematic violations of the underwriting guidelines. We asked  
13 the defendants on Friday to start with that as the starting  
14 point and say, identify if you have claims -- and some of them  
15 have had claims -- that these litigations are simply not  
16 relevant, then can you identify which ones you're claiming are  
17 relevant and not relevant. And we haven't heard back on that.  
18 But that is a very obvious starting point.

19 To answer your Honor's -- a different thing that you  
20 might be referring to, your Honor, we also had proposed at one  
21 point, FHFA, to -- because this issue has been under discussion  
22 for a very long time -- to try to jump-start it, we offered,  
23 could we at least exchange lists, because they've made similar  
24 requests of FHFA, of which litigations each party believes that  
25 they think are in play in response to these document requests.

1 And effectively there, your Honor, we had at least -- I'm going  
2 to limit my comment, I think, to UBS. There are some others  
3 who have taken dispute along the way, but I think it's most  
4 crystallized with UBS. Their view was, if your list is going  
5 to exclude single-family information, then we're not going to  
6 have reciprocal agreement. And it's ultimately in our  
7 position, your Honor, and this will be consistent with what  
8 Mr. Schirtzer told you last time, if there is an investigation  
9 out there involving GSE that is partly single-family and partly  
10 private-label securitization, we're willing to consider that  
11 investigation in play and would be willing to consider perusing  
12 documents from that production. But it seemed that we were at  
13 an impasse with UBS because they're of a view that we should  
14 still be producing even things that were wholly single family.

15 From our side, we feel that the list idea did not  
16 work, that we've made very clear from the very moment we filed  
17 the cases which litigations we thought were relevant to this  
18 suit. And it is now, you know, months of meet-and-confers  
19 later, and as I say I don't want to back away from the idea  
20 that I think there could be more discussions, but I also don't  
21 want to lead the Court to believe that things are in a  
22 different place than they are.

23 THE COURT: So, Ms. Chung, do I understand that there  
24 was a formal written document demand for the list of the  
25 litigations and investigations?

1 MS. CHUNG: No, your Honor. No. No. There was no  
2 document requests for lists. We made the document requests for  
3 the documents.

4 THE COURT: OK. And you have not gotten a list.

5 MS. CHUNG: What we did ask for is for them to take  
6 the lists that would be the cases and investigation of our  
7 complaints and to list back to us, well, which ones do you  
8 think are not in play here, because we thought maybe that would  
9 get us a little bit down the road.

10 THE COURT: Do you feel that the plaintiff -- when I  
11 was thinking about this, it just seemed to me -- and I  
12 understand, a document request is for the documents, not for a  
13 party to create a list that doesn't otherwise exist. But it  
14 just seemed to me, in terms of making any dispute concrete and  
15 seeing whether or not the parties could reach agreement about,  
16 yes, we all agree that a production with respect to this  
17 universe is appropriate, we have a dispute about these other  
18 cases, that it would be helpful to have a list of litigations,  
19 a list of investigations, and start production with respect to  
20 those who have agreement about.

21 MS. CHUNG: As part of the meet-and-confer process,  
22 your Honor, we did ask to exchange those lists. We have done  
23 that. And not only was there a single-family issue; at  
24 different points we had heard, well, we're not going to  
25 consider something a relevant investigation or civil litigation

1 if it doesn't involve the very same securitizations at issue in  
2 that case. That's another issue at which we have impasse. We  
3 would never adopt that view.

4 But that being said, the last idea that was exchanged  
5 was indeed maybe a variation of what your Honor is pursuing  
6 here, which is, can we at least look at the complaint and  
7 figure out which ones you agree and don't agree with because  
8 then maybe it will crystallize what the areas of disagreement  
9 are.

10 THE COURT: OK. Is there someone from the defense  
11 side that would like to address this issue?

12 Mr. Fumerton.

13 MR. FUMERTON: Your Honor, I could address the latter  
14 issue in terms of the regulatory investigations in other  
15 proceedings. We are in the process of meeting and conferring  
16 with the plaintiff. We're hopeful we can reach an agreement.  
17 We had the discussions as of late Friday. Plaintiff indicated  
18 it was focused on the exchange of testimony, both written and  
19 oral testimony, that had been given in other RMBS actions.  
20 It's important to stress, defendants are situated very  
21 differently here, have different views. Speaking on behalf of  
22 UBS only, I hope you do think it's a productive idea to have an  
23 exchange of testimony from actions, RMBS actions and actions  
24 relating to allegations in the complaint. We'll meet and  
25 confer with plaintiff and hope we can reach an agreement on

1 that issue.

2 THE COURT: Thank you.

3 MR. FUMERTON: Thank you, your Honor.

4 THE COURT: Any other defense counsel wish to be  
5 heard?

6 Ms. Shane.

7 MS. SHANE: I would only underscore what Mr. Fumerton  
8 said, which is that this is a very defendant-specific issue,  
9 and for JPM, over the course of the weekend, it looked to us as  
10 if we have an agreement governing testimony with the plaintiff,  
11 and so we don't think that it would be accurate to think that  
12 these folks can't resolve these issues. We have experience  
13 that they have.

14 THE COURT: Ms. Shane, are you making a distinction,  
15 when you say testimony, between deposition transcripts,  
16 affidavits, and declarations, or are you including all three  
17 categories?

18 MS. SHANE: The way that the parties have been talking  
19 about testimony has included witness statements, which would  
20 appear to me to potentially include those that had previously  
21 been written down, but we have not used the vocabulary your  
22 Honor used. I'm sure we will hash that out once we get back to  
23 the document and what we've agreed.

24 THE COURT: And Ms. Shane, has there been any  
25 distinction in these discussions between litigation that's been



1 filed in court and therefore part of the public database, so to  
2 speak, and investigations that may not yet be public? Was that  
3 then a subject of discussion?

4 MS. SHANE: The issue has arisen, yes, your Honor, and  
5 it does raise very different kinds of issues for different  
6 defendants. But it has come up in our discussions with  
7 plaintiffs well as well. And Ms. Chung indicated, the focus at  
8 this time, because it does look like there's a substantial  
9 likelihood of agreement, has been on the proceedings, whether  
10 regulatory or litigation-oriented, that plaintiff already has  
11 identified in their complaint as relevant ones, and that we can  
12 all at least get out of the way as ones where we can reach  
13 agreement by ourselves.

14 THE COURT: OK.

15 MS. CHUNG: Could I make a proposal, your Honor?

16 THE COURT: Yes, Ms. Chung.

17 MS. CHUNG: I did want to clarify one thing, which is,  
18 we certainly intended our requests to apply to the different  
19 categories that your Honor identifies, the deposition  
20 transcripts, etc., etc. We also specifically raised with the  
21 defendants throughout the meet-and-confers that, to us, any  
22 deposition testimony should include exhibits, that that would  
23 be considered part of the deposition.

24 I think on this issue, as on the first issue we  
25 discussed -- and you know this, your Honor, that's one of our

1 overriding considerations, is the overall time schedule. We've  
2 been talking about this issue for a very long time. I think it  
3 would be useful if we were -- maybe I'm volunteering for  
4 something -- I think we should be reporting to the Court, as we  
5 are in the first issue, in short order on whether we have been  
6 able to make progress.

7 THE COURT: Yes. Well, I have Thursday afternoon  
8 free. So I think we have to get this issue with respect to  
9 prior cases and investigations teed up for Thursday. Hopefully  
10 the meet-and-confer process between the parties will mean it  
11 doesn't have to be on the agenda for Thursday afternoon. But I  
12 think it has to be defendant by defendant, since some  
13 defendants may have no quarrel with the production or have  
14 concerns about certain aspects of it.

15 So I'm going to need a chart from plaintiff's counsel  
16 about where the problems lie defendant by defendant. I think  
17 that the parties need to produce to each other, to the extent  
18 they've made requests for documents from each other -- and I  
19 understand the defendants have made requests from the  
20 plaintiff. I think it's almost impossible to get our hands  
21 around this without a list of the lawsuits or regulatory  
22 actions that have been filed and are part of the public record,  
23 and there shouldn't be any problem with creating such a list  
24 since it is a matter of public record.

25 With respect to investigations that are not a matter

1 of public record, I think that should be a subject of the  
2 meet-and-confer process. There may be less need for that if we  
3 have fulsome discovery with respect to actions that are filed  
4 and publicly available.

5 So I'm going to expect with respect to these prior  
6 cases and investigations that the meet-and-confer process will  
7 continue this week and to the extent there isn't agreement with  
8 any particular plaintiff and defendant, of the plaintiff with  
9 any particular defendant, I'll get a schedule or list from FHFA  
10 and they will be on the agenda for Thursday afternoon.

11 Which defense counsel wants to address the issue about  
12 the date ranges?

13 MR. WOLL: Your Honor, David Woll. I'll do that if I  
14 may. As defense counsel noted, FHFA has raised this issue in  
15 12 of the 16 cases. As I understand there are meet-and-confers  
16 with the other four cases with this issue still being  
17 discussed. In fact we were meeting and conferring with FHFA in  
18 the 12 cases when the letters to the Court were sent. And as  
19 counsel also pointed out, there are two timing issues. One is  
20 the request for e-mails up to the date of the complaint, and  
21 the other one is the bubble issue.

22 So firstly with respect to the e-mails up to the date  
23 of the complaint: Prior to raising the requests to the Court  
24 that all custodians, all e-mails for all custodians be searched  
25 up to the date of the complaint, FHFA had not requested that

1 from any of the defendants. What FHFA had requested was that  
2 defendants consider providing e-mails or searching for e-mails  
3 for limited groups of custodians who had post-securitization  
4 responsibility, which was a part of the negotiations to be  
5 hammered out, and in fact some defendants have agreed to  
6 provide post-securitization e-mails up to the date of the  
7 complaint for some groups of custodians. Deutsche Bank, for  
8 instance, has agreed to provide e-mails with respect to  
9 repurchase claims, which counsel mentioned was one of the  
10 things that they were interested in. Other counsel have either  
11 agreed to provide either e-mails or search central files for  
12 those types of documents. But the request that all custodians  
13 and all e-mails up to the date of the complaint be searched and  
14 produced was made for the first time in the October 9th letter  
15 to your Honor. That in fact is not even what FHFA itself is  
16 doing. As FHFA noted in that letter, it has certain custodians  
17 which it believed had post-securitization responsibilities.  
18 And for those custodians, about half of the custodians it said  
19 in the letter, it is doing searches up to the date of the  
20 complaint, but not for the rest of the FHFA custodians. So as  
21 the record currently stands, FHFA is asking defendants to do  
22 something that it has not agreed to do itself.

23 THE COURT: Do I understand correctly, then, that some  
24 of the defendants have agreed to custodian searches up until  
25 the date of the complaint -- I guess that's September 2,

1 2011 -- who had post-securitization responsibilities, and other  
2 defendants have not?

3 MR. WOLL: Correct, your Honor. And this is, again,  
4 this is a defendant-by-defendant specific issue, and when  
5 plaintiff in their letter requested leave to brief this as a  
6 motion to compel, I think the defendants envisioned that each  
7 of them have particular issues to raise in response to the  
8 negotiations that have gone on with the plaintiff in that  
9 particular situation. Deutsche Bank, for instance, as I said,  
10 on the repurchase point, has designated people who were  
11 involved in that activity, that they had such people, and is  
12 providing e-mails for that category. Not everybody has people  
13 involved in the activities that the plaintiff has designated.

14 So I think there are two problems with the plaintiff's  
15 request. First of all, there is no need to search for e-mails  
16 that postdate the transactions at issue by as many as five  
17 years. The documents that plaintiff is searching for are  
18 likely not going to be relevant at all to the issue in dispute.  
19 And if I can identify the four things that FHFA mentions in its  
20 letter that it wants these e-mails for and then talk about them  
21 a little bit, one of them is repurchase requests. As I said,  
22 some defendants have already agreed to provide information  
23 about that. The other issue that they identify is  
24 securitization and loan performance, i.e. downgrades, defaults,  
25 delinquencies, and delinquency. Well, that's all a matter of

1 either public record or easily accessible record. I don't  
2 think FHFA would tell you that they don't have access to  
3 information about the performance of the securitization or that  
4 they can't through Intex or APS or some other system get access  
5 to performance information on securitizations or loans. So the  
6 parties don't have to greatly expand the scope of their e-mail  
7 production. And I assume if this were done it would be done on  
8 a reciprocal basis so that all the FHFA custodians and all the  
9 defendant custodians would have to be searched for this  
10 additional five-year period, which would generate obviously  
11 millions of additional e-mails. I don't think we have to go  
12 through that exercise just to figure out how the transaction  
13 was performed because I think there are other more readily  
14 accessible sources of that.

15           The other category that FHFA identified in its letter  
16 to the Court were poor underwriting practices. First of all,  
17 the issuance so far as the claims against defendant are  
18 concerned is not whether the originators underwriting practices  
19 were poor, but, rather, the extent to which the loans and the  
20 securitizations departed from underwriting guidelines with the  
21 disclosures concerning LPDs and owner occupancies assistance.  
22 By contrast, I would note that HFA's knowledge post  
23 securitization is a lot more relevant to this case due to the  
24 statute of limitations on this issue if not other things.

25           But insofar as information to be derived from the

1 defendants' e-mails is concerned, the question of whether loans  
2 complied with the underwriting guidelines or representations  
3 can be deduced by looking at the contemporaneous e-mails around  
4 the transaction. There's no need to go searching far and wide  
5 for years after the transaction to see if there's some e-mail  
6 where somebody in 2009 said, you know, I remember back in 2006  
7 this originator wasn't complying with this particular guideline  
8 in place at the time. Is it possible that a potentially  
9 relevant e-mail could be found if we looked at all the e-mails  
10 for that five-year period? Sure. Is it worth it? We submit,  
11 no.

12 And obviously with respect to the fraud issues, or  
13 those who have fraud claims against them, anything that  
14 happened after the transaction is completely irrelevant to  
15 dates' state of mind vis-a-vis the fraud issue.

16 The other thing that the plaintiffs say they need the  
17 information for is defendants' retrospective realizations of  
18 risks created by poor underwriting practices. Frankly I'm not  
19 exactly sure what that means. But, again, to the extent it  
20 means that defendants' knowledge post securitization is somehow  
21 relevant to their state of mind at the time of the  
22 transactions, that's just simply not the case.

23 So if I may, let me just talk about the bubble issue  
24 next.

25 THE COURT: Well --

1 MR. WOLL: Well --

2 THE COURT: Or not. I just want to make sure,  
3 Mr. Woll, that I've captured what you've just told me.

4 MR. WOLL: Yes.

5 THE COURT: For those defendants who agreed to what,  
6 we'll call it the five-year search, for custodians who have  
7 post-securitization responsibilities, are you saying that you  
8 want to further limit the search of those custodians on these  
9 four topics? Or -- I'm not quite sure how these four topics  
10 intersect with those custodians.

11 MR. WOLL: Again, each defendant is situated  
12 differently. But what we did on the repurchase issue was, we  
13 agreed that there are certain individuals who were identified  
14 in repurchase activities. Your Honor knows what the repurchase  
15 claims are. So what we propose to do is to run terms designed  
16 to obtain information about those repurchase claims. We know  
17 what loans and what securitization repurchase claims were made  
18 for. So we have terms doe signed to identify documents  
19 relating to repurchase claims.

20 I think other defendants may have agreed to do  
21 something after 2007 for some custodians, maybe not all the way  
22 up to the date of the complaint. It really varies defendant by  
23 defendant, so I don't want to misrepresent it.

24 THE COURT: So even for defendants who have agreed  
25 that certain custodians who have post-securitization



1 responsibilities, that their e-mails may be searched for this  
2 five-year period, even in those circumstances, they're asking  
3 that the searches be narrowed to what they believe are relevant  
4 topics.

5 MR. WOLL: Well, your Honor, again, just speaking for  
6 Deutsche Bank, what we did, because these were repurchase  
7 custodians, is, we thought it made sense to look for repurchase  
8 documents. If plaintiff prefers instead we do the originator  
9 search term for those custodians, I think frankly the  
10 repurchase search terms are going to pull up as many if not  
11 more than the originator search terms for these particular  
12 individuals. But I don't know that. I have to run that test.  
13 But it's not a limiting exercise that we were doing. It was  
14 more a question of trying to focus in on what people actually  
15 did and what information we were trying to get from them.

16 THE COURT: As I hear this, one of your concerns --  
17 this should be a concern, no doubt is a concern -- on behalf of  
18 plaintiff and all defendants -- is that you would get an  
19 extraordinary volume of e-mail with the burden of searching  
20 that if you extend the search for all custodians who are  
21 relevant during the period of the securitizations and move it  
22 forward five years.

23 MR. WOLL: Yes, your Honor.

24 THE COURT: So if we had an identification of a subset  
25 of custodians and did a narrow search, or somewhat narrow

1 search, of a reduced group of custodians for the five-year  
2 period, could that be the basis of an agreement, do you think?  
3 I know you can't speak on behalf of anyone else but your  
4 client.

5 MR. WOLL: Your Honor, I think it could. We reached  
6 agreement with respect to the repurchase issue. We didn't hear  
7 back from plaintiff specifically with respect to other  
8 custodians on our list that they thought this would make sense  
9 with. But the concept that there are limited categories of  
10 relevant information post securitization we agree with, as I  
11 imagine other defendants do too. It's doing the  
12 across-the-board all-custodian thing that we think is just  
13 frankly abnormal.

14 THE COURT: I interrupted you. You wanted to go on to  
15 something else.

16 MR. WOLL: Your Honor, I'm sorry, I was just going to  
17 talk about this bubble issue that counsel mentioned, which is  
18 that some defendants -- and Deutsche Bank is one -- for the  
19 period from 2005 to 2007 when the securitizations were being  
20 done, have taken what we've been calling the bubble approach so  
21 that for each securitization a period of three months before  
22 the securitization until one month after the securitization has  
23 been searched, all custodians' e-mail have been searched for  
24 that period. And the idea behind that search is that  
25 originators who were involved in those securitizations, e-mails

1 relating to those originators and whether the specific loans  
2 underlying those securitizations complied with underlying  
3 writing guidelines, etc., that that search would capture those  
4 e-mails.

5 Now, in practice what happens with an originator that  
6 hasn't been involved in multiple securitizations is, over the  
7 course of that period, their e-mails would be captured over a  
8 much larger period of time. So, for instance, we have one  
9 originator that, for example, American Home, where the bubble  
10 overlaps because they were involved in so many securitizations.  
11 So essentially e-mails for the entire period from July '05 to  
12 August '07 are provided that mention American home.

13 So as I said, it's designed to capture e-mails that  
14 relate to securitization, including e-mails that focus on this  
15 specific issue of whether the loans at issue complied with the  
16 guidelines.

17 We all know that these guidelines changed on a very  
18 frequent basis and that a comment about what allegation  
19 originator is doing in 2007 is not necessarily relevant to  
20 whether that originator's loans complied with guidelines in  
21 2005.

22 So that's why we thought the approach made sense. It  
23 would get at the relevant documents and frankly would allow us  
24 to complete the e-mail review that we need to complete on a  
25 fairly compressed schedule, especially those of us who have

1 relatively big case. We have 42 securitizations in our case.

2 We told the plaintiff that we were doing this back on  
3 June 11. And since then there have been at least three or four  
4 letters exchanged where Deutsche Bank at least says this is  
5 what we're doing and defendant and the plaintiff says, we know  
6 that you're doing this. And then they raised other issues.  
7 But, again, they didn't raise this bubble issue until they  
8 wrote to the Court.

9 THE COURT: And I didn't even see it in the letter.  
10 So...

11 MR. WOLL: OK. See, they snuck it right in there.  
12 So, your Honor, we think the bubble approach for our documents  
13 gets at the relevant documents. Again, is it possible that  
14 some relevant document might be missed with the bubble  
15 approach? It's possible. But we doesn't think it's, frankly,  
16 very likely. And we think that, given the inordinate amount of  
17 documents that all the defendants are going to be producing,  
18 FHFA is going to have more than enough relevant documents to  
19 look at. So far, the defendants have searched e-mails from  
20 over 600 custodians and collectively produced over 2.4 million  
21 documents comprised of over 33 million pains. It's a lot to  
22 read. We're producing a lot of documents. And we took the  
23 approach that we've taken and some of the other bubble  
24 defendants have taken.

25 THE COURT: And Mr. Woll, those numbers that you just

1 gave me, are you talking about the defendants collectively?

2 MR. WOLL: Yes.

3 THE COURT: Thank you.

4 MR. WOLL: I'm sorry, your Honor. Excluding loan  
5 files.

6 THE COURT: So Ms. Chung, is it helpful to think about  
7 the post-closing period for a reduced number of custodians,  
8 searches during the five-year period for a limited number of  
9 custodians of each institution?

10 MS. CHUNG: Your Honor, we did propose that along the  
11 way. We would like to argue this, your Honor, with your  
12 permission. I want to address particularly two things that  
13 your Honor just heard. One, these are really the most  
14 important documents in the case. It was later in the time  
15 period, especially after the mortgage crisis hit, that people  
16 began talking about -- and saw public and privately that the  
17 performance was failing -- that people began writing e-mails  
18 about what the problems in origination process had been. So I  
19 think it's exactly understating the importance of this category  
20 of documents to say, well, it's limited to these subsets so  
21 this is really not a big deal, you have enough documents. So I  
22 want to address the relevant particularly, but also what your  
23 Honor had proposed, which is, doesn't it seem logical that some  
24 subset would do. And I embrace that, your Honor. The letter  
25 that they attach as Exhibit B to their letter to your Honor was

1 a proposal that we made in July saying, here's a proposal from  
2 us, since we've been talking about time frames, we don't seem  
3 to be making much progress, let's consider a post-closing world  
4 and a pre-closing world. And in the three months since then,  
5 your Honor, what's happened is, FHFA has 111 custodians, and  
6 our post-closing world is 66 custodians. We are now reviewing  
7 2.8 million documents just in the post-closing period. And  
8 why? Because I can't stand in front of your Honor and say that  
9 it's not relevant. It's relevant. You've heard them make the  
10 arguments about GSEs came to these realizations. We need to  
11 know what they know. Well, we agree with that. So we're  
12 searching seriously in this post-closing period. Their  
13 numbers, when Mr. Woll says, well, we have subsets, seven of  
14 the defendants have nominated one or zero custodians in the  
15 time period. So whatever searches they're doing, they're  
16 reaching -- and their custodian numbers overall are much lower  
17 than ours, with the exception of JP Morgan and UBS -- I want to  
18 be careful to make some distinctions. They have significant  
19 numbers of custodians. But we're talking about almost all  
20 defendants have less than 50 custodians to begin with. And the  
21 range of post-closing custodians they're searching is from 0 to  
22 15.

23 So, your Honor, when we proposed that we could think  
24 about, let's think about this, let's split the world, and then  
25 we had multiple meet-and-confers about what that world would

1 look like, what we found is, we're getting dribs and drabs on  
2 specific topics, exactly the ones Mr. Woll mentioned. So  
3 repurchases, some, not all defendants have agreed to nominate  
4 repurchase custodians. This is critical information, because  
5 as the banks got repurchased and evaluated them -- so these are  
6 loans that are being put back because somebody realizes there  
7 is something wrong with them -- when they write e-mails about  
8 those repurchases or they're applying standards about whether  
9 the guidelines meet them and what they are going to agree  
10 that's a properly repurchased loan, that is a whole -- that's  
11 everything on what they believe the guidelines mean. And so,  
12 yes, we're looking for that information.

13 And we're getting from some defendants, we'll give you  
14 one or two people on that. We don't have a good way to get  
15 behind what the nominations are. But we've also had defendants  
16 tell us, we don't have anybody who did any of these things, we  
17 don't have anybody who did monitoring of the performance, not  
18 just the public monitoring but the reaction to the public  
19 monitoring -- gee, do you see what that bond is doing, that's  
20 something that we never expected would happen, what do we think  
21 is going on. And we know from the media reports and  
22 allegations in the complaint that what's going on there is, you  
23 will see e-mail traffic of people saying, well, we knew that  
24 they were doing things they shouldn't be doing.

25 But I want to be clear, it's not just about knowledge

1 of falsity. All of this information goes to falsity.  
2 Departures from the underwriting guidelines are the heart of  
3 the case. And the search terms that we're talking about are  
4 things like the name of the underwriter, plus "abandon," plus  
5 "departure," plus "guidelines." So if you're not running that  
6 search any time past 2007, which is what half of the defendants  
7 are doing, then it's giving FHFA a null set. OK. In that  
8 period, the meaning of a repurchase -- repurchase didn't start  
9 going seriously until 2009. So saying that you're going to do  
10 your searches up to 2007 or 2008 is offering FHFA exactly zero.  
11 It's a false offer.

12 So, your Honor, what we have done is, in this long  
13 process, I think -- and this is why I started with, I agree  
14 that some of the defendants are -- they're not all perfectly  
15 situated, but I think also there's just not a meeting of the  
16 minds on this idea that -- we're not talking about one or two  
17 people. You have to seriously go and look at who worked on  
18 repurchases. Not a single defendant has offered anything on  
19 this category that Mr. Wilson can understand, which is the  
20 retrospective reviews.

21 Another thing that happened after the mortgage crisis  
22 hit is that all these banks, the GSEs, everybody, took a step  
23 back and many of their risk committees, the very highest  
24 echelons of these banks and entities said, why did this go  
25 wrong, where did we abandon our risk policies, and anybody who



1 was in these litigations knows that the parties on all sides  
2 have these reports. These may not be ordinary custodians.  
3 This is not going to be the trader. This is going to be some  
4 special theater or the highest people who were looking at risk  
5 in the institution. And so it takes some diligence to figure  
6 out who these people are. And what we found in our  
7 meet-and-confers was that diligence was not being exercised.  
8 When we are told there's nobody in the post-closing period that  
9 is relevant, that is very, very difficult for us to accept even  
10 if it's also hard for to us attack.

11 And so, your Honor, I think what we ultimately  
12 defaulted to, because we just found that we were not making  
13 headway on this, is, OK -- no one is saying, by the way, during  
14 these meet-and-confers, nobody said this was not relevant. I  
15 think we all understand it's relevant. What we're hearing is,  
16 it's burdensome, OK. So as I explained, FHFA has taken on the  
17 burden. Our view is, only one or two defendants gave us  
18 figures on burden. Those figures are AA. I mean, when  
19 somebody tells me, I got 2 million hits, well, you know, we got  
20 2 million hits, but that means there are relevant things. It  
21 may take a while to go through it, but it's there. So our  
22 option was, you know what, if this is where we are, run the  
23 terms, run the terms on everybody. If certain people are  
24 completely irrelevant, you won't have any hits on them. So  
25 that shouldn't be the issue. And this is the way that we're

1 going to find what is some very, very meaty information that is  
2 highly relevant to the case.

3           Given that we proposed this idea of the pre-closing  
4 and post-closing world, I think, your Honor, certainly one  
5 thing that we had a lot of problems with, in addition -- it  
6 sort of layers onto this problem -- is, we've made many  
7 requests. FHFA two months ago supplied a list of defendants of  
8 all 111 custodians, what their title is, what their department  
9 is, what their role is. And you can imagine that many of these  
10 meet-and-confers in order to test the adequacy of the custodian  
11 list and to test the adequacy of the custodian list for the  
12 post-closing period, we're seeking information about what these  
13 people did. We asked the defendants for reciprocal  
14 information. And in many cases we didn't get it. I had a  
15 demonstrative, which unfortunately I can't show your Honor, but  
16 what we depict is, we sent Credit Suisse, for example -- we  
17 were on a meet-and-confer and they said, you know, well, what  
18 information do you want, so what information don't you have.  
19 We actually made a chart with 30 rows or so with all the  
20 custodians, the name -- we filled in what we had. And we left  
21 question marks in the boxes we didn't have. And we asked for a  
22 limited description of the role so we would see what these  
23 people are doing. And what we got back was a partial amount of  
24 that list in which the last column had been deleted, the  
25 description of what the person does.

1 OK. That in a nutshell is kind of the problem that  
2 we've been having in probing the adequacy of the post-closing  
3 period. I want to be clear, the number that we have just don't  
4 add up. There is not a way that you don't have a single person  
5 in the organization, just one person. But if we were to go to  
6 one system where we are denominating people, then I think at a  
7 minimum what FHFA would need is more information to tell what  
8 the list is because we have applied that backup route and it  
9 also has not really worked.

10 I'm kind of reluctant to hand around a demonstrative  
11 because they came in during the period and defendants haven't  
12 had a chance to see them. But I think that describes kind of  
13 where we've been.

14 I would like to just answer -- the negotiating history  
15 obviously is relevant. The defense has raised it. And as I  
16 say, I raised the idea that we originally proposed pre- and  
17 post-closing world. We did raise with the defendants, I just  
18 want to answer this, certainly in the meet-and-confers that I  
19 was involved in, we raised with the defendants that we were  
20 producing, because of this law enforcement negotiation for lack  
21 of progress, that they just run all the custodian terms for  
22 everybody. And that is indeed, for example, in the instance  
23 where we got numbers back on what the number of hits would be,  
24 that is what the defendant did to try to demonstrate this, and  
25 this is going to return a lot of documents, maybe not a

1 shocking proposition to begin with. But it's not true that  
2 this was first raised with defendants in the letter.

3 Your Honor, I just would say a few things about the  
4 data so that your Honor has the full picture. We have a few  
5 defendants who have offered a few repurchase custodians, which  
6 is not adequate. We have some defendants who have offered  
7 nobody. We have no defendant who has offered any custodian on  
8 these retrospective reviews. And on performance or monitoring  
9 of performance, I would say, I think maybe half of defendants  
10 have offered between zero and eight people on this topic.

11 THE COURT: Mr. Woll.

12 MR. WOLL: Can I just be heard on a couple of things,  
13 your Honor. First of all, on the repurchase documents, I just  
14 wanted to mention this, FHFA has taken the position that all of  
15 its internal repurchase documents are privileged, so they're  
16 not going to be producing, as I understand it, any internal  
17 repurchase documents. And just as a point of clarification,  
18 repurchase claims involve lots of things. They don't just  
19 involve the purchase and underwriting guidelines. And so there  
20 could be repurchase documents that we come up with that have  
21 nothing do with underwriting guidelines.

22 In terms of relevance and the argument that it's not  
23 just the state of mind but it's compliance with guidelines,  
24 this information after the fact, well, the whole point of this  
25 sample that the plaintiff has proposed where this

1 reunderwriting exercise has been discussed is, that's going to  
2 be a lot of focus on loans to determine whether they in fact  
3 complied with underwriting guidelines or not. So, again, to do  
4 a huge e-mail review to see if somebody said something three  
5 years after fact about compliance with the date of the  
6 transaction I don't think is a particularly efficient way to  
7 go.

8 And then finally, just with respect to details about  
9 the custodians, as far as I know, and I could stand to be  
10 corrected, I don't think we got detailed information about the  
11 FHFA custodians in terms of which ones they've decided have had  
12 post-securitization responsibilities or how they made that  
13 decision.

14 THE COURT: Thank you.

15 So to the extent that -- most of these cases are  
16 non-fraud cases. There are only six of the 16, I think, that  
17 have fraud claims in them. And even the fraud claims, of  
18 course, are enormously impacted by the Section 11 claims, the  
19 straight misrepresentation claims. And statements that the  
20 defendants make which the plaintiffs would argue would be  
21 admissions that there was a noncompliance with underwriting  
22 guidelines or underwriting practices would take some of the  
23 disputes potentially off the table here. So I can certainly  
24 understand the importance of having a meaty production for the  
25 post-closing period.

1           And with respect to these four categories of topics  
2 outlined in the plaintiff's letters and which Mr. Woll  
3 addressed, it seems to me each of them is an appropriate ground  
4 for post-closing discovery. It remains unclear to me, though,  
5 whether we need all custodians searched. But I think the  
6 burden would be on the defendants to make a showing that a more  
7 limited search would be sufficiently productive. It seems to  
8 me if executives, people with management responsibilities,  
9 people who are members of special committees and make reports  
10 for the institution with fact finding about what happened, in a  
11 way that could be binding on the defendants at trial or  
12 certainly highly relevant to a jury's analysis of the defenses  
13 that are being put forward at trial, they have to be searched.  
14 So if a defendant doesn't want all the custodians searched for  
15 the five-year period, then I think they have a responsibility  
16 to create a custodian list that identifies the custodians by  
17 title and role and with a sufficiently detailed description of  
18 their jobs and responsibilities to make a showing that a search  
19 of their e-mails for the post-closing period won't be likely to  
20 produce or isn't sufficiently likely to produce productive  
21 materials.

22           It seems to me in the post-closing period what we're  
23 talking about would be -- and, Ms. Chung, I'm happy to hear  
24 from you on this -- but I think what we're talking about in the  
25 post-closing period is people with a high-enough responsibility

1 within the organization that their knowledge and observations  
2 about these historical practices bear some weight, and that  
3 some of the more junior-level people, that would have highly  
4 relevant information during the periods of securitizations  
5 themselves, their stray comments or thoughts might be of less  
6 interest or importance in the post-closing period. One could  
7 argue the other way. But I think that defendants need to get  
8 to the plaintiff by the close of business tomorrow a list of  
9 their custodians by title and role and indicating which  
10 custodians they do not believe there should a search for for  
11 the post-closing period, so that there can be an adequate  
12 meet-and-confer on that topic on Wednesday between the parties  
13 and so Thursday afternoon I can address any areas of  
14 disagreement.

15 With respect to the bubble --

16 MS. CHUNG: Your Honor, I didn't really address that.  
17 I don't know -- I could do it briefly.

18 THE COURT: Ms. Chung.

19 MS. CHUNG: It is a version of the same argument  
20 because -- on this one I want to be clear, there's a clear  
21 split in defendants. I want to give credit; a lot of  
22 defendants are not using this bubble approach. For FHFA it was  
23 never an issue because on our side, and one of the reasons --  
24 it was funny when you said I didn't see it in the letter. On  
25 our side we don't have a bubble because we just ran all our

1 custodians pre-period for all deals and all originator terms.  
2 Most of our employees worked on the same deal so it didn't make  
3 a difference. So our eye was not really on the idea that you  
4 would ever try to separate the originator terms by deal. And  
5 so when defendants started doing that, and there's been some  
6 the movement in it but now I think it's clear there's sort of  
7 two camps. One camp is searching it all the way through. And  
8 another camp has said, no, we're always going to associate an  
9 the individual originator with the deal that they were welded  
10 to. And the problem with that, your Honor, again, is the  
11 arbitrary cutoff of relevance. It may be, you know, there are,  
12 for example, there is an example in the -- I think it's Merrill  
13 Lynch, where during the time period the deals are being done --  
14 that's information that comes about in different RBS case  
15 that's public because there has been motion practice about it,  
16 so, oh, gee, this originator, looks a little weird, let's start  
17 doing some quality control on this. OK. If that kind of thing  
18 happens and they're looking for quality control in the  
19 origination of the loans, that's not going to happen in a  
20 four-month window. So that's the logic, that it's just -- I  
21 think it's hard to say that it's burdensome if the plaintiffs  
22 are doing it and then there's this kind of arbitrary three  
23 months before, one month after that we don't think bears any  
24 relation to the relevance of the documents.

25 THE COURT: Ms. Chung, with respect to that division



1 between pre-closing and post-closing, where is that line drawn,  
2 in your view?

3 MS. CHUNG: In terms of what, your Honor?

4 THE COURT: An individual defendant.

5 MS. CHUNG: Well, I guess the distinction we drew,  
6 your Honor, is, we're not insisting -- we put the bubbles  
7 around what we've been calling the deal terms. So there have  
8 been two sets of searches. One is geared off of the actual  
9 securitization names and the CUSIPs and things like that. That  
10 to us is debatable. Frankly, we could have asked this as well,  
11 I think, but we didn't. We said, OK, if you want to run the  
12 deal terms in bubbles, that makes some sense because you expect  
13 there to be higher volume about the deal when it's being  
14 arranged. But to us the originator information is not like  
15 that. There can be e-mail chatter about the originators and  
16 their practices and perhaps the falsity of their  
17 representations in the offering materials to the extent they're  
18 talking about departures from the guidelines at any point in  
19 time. And so I guess what I'm saying is, much of the argument  
20 for us is the same.

21 THE COURT: But then you made the proposal of a pre-  
22 and post-closing search and a distinction between the two. For  
23 any individual defendant, what is the demarcation for it?

24 MS. CHUNG: Your Honor, it depended on what duties  
25 they had. So we were saying -- it's not unlike what your Honor

1 was just saying. If you can give us enough information that  
2 they only would have had e-mail traffic in an earlier period,  
3 so this might be people who are doing the arranging of the  
4 deal, so all they're doing is picking the loans that are going  
5 to go into the deal, that could have some logic to it, there's  
6 no need to go up to the date of the complaint from  
7 post-closing. But that was exactly the kind of information  
8 that we found it difficult to get.

9 I think the key thing was what your Honor identified,  
10 which is -- because I think most of the defendants have already  
11 staked out the position that if they're on the custodian list  
12 and they haven't already been designated by them as a  
13 post-closing custodian, that those people do not have duties  
14 that would implicate those fewer areas.

15 I think what we're -- so we're very interested in the  
16 first part of what your Honor ordered, which is, can you  
17 identify people in these four buckets who -- have you  
18 identified those people, if they are the higher-level people  
19 that's fine -- who did have responsibility for these things. I  
20 think that's really what we've been missing.

21 THE COURT: Do you agree that with respect to that  
22 five-year period -- I'll call it the post-closing period --  
23 that what is most important to the plaintiff are things that  
24 could be thought of as admissions, that they are basically  
25 things that were said to, heard by, or articulated by people in

1 managerial or executive positions with respect the  
2 organization?

3 MS. CHUNG: Yes. Your Honor, I think we could make a  
4 broader argument. It depends. For example, on repurchases,  
5 many of these entities had, when repurchases started coming in  
6 in big volumes, they would form committees where there would be  
7 standards set. There would even be things like, you know, I've  
8 seen a policy that said to employees, if you can find ways to  
9 turn down these repurchases, you'll get incentive-based pay.

10 So there can be a range of things that e-mail traffic  
11 and -- you know, it can be at a committee level. It can be at  
12 the executives' level. I understand what your Honor is saying  
13 about having the importance to bind the company. But I think  
14 in many ways -- I mean, this is an argument defendants have  
15 made -- that, you know, you're an employee and you're there and  
16 that's still relevant information if you're talking about the  
17 business and the aspects of the business that are relevant to  
18 the case.

19 But I hasten to say, I think that a big issue has been  
20 for us so far just identifying any people that relate to those  
21 four buckets. That's what the big hurdle has been so far.

22 THE COURT: Mr. Woll.

23 MR. WOLL: Yes. Your Honor, I just wanted to add that  
24 you instructed defendants to provide information about their  
25 custodians and ones that are not appropriate for post-

1 securitization search, and I would ask that the plaintiffs be  
2 asked to do the same thing.

3 THE COURT: I thought Ms. Chung gave you a chart like  
4 that. She was describing what she provided, FHFA provided to  
5 the defendants, with title and duties. Did I misunderstand  
6 you, Ms. Chung?

7 MS. CHUNG: No, your Honor. I have copies. Yes, we  
8 have turned over a full list of our 111 custodians with their  
9 functions and the time frames to the defense.

10 MR. WOLL: And the defendants did too, at least  
11 Deutsche Bank, we provided a list of custodians and what their  
12 titles were. But if we are to justify why people should not be  
13 subject to a post-securitization search, that's additional  
14 information we would ask the plaintiffs also to provide,  
15 because understandably the title may not tell the whole story  
16 and since that's what we've been provided, it doesn't  
17 necessarily show why they're not doing it on the other half of  
18 their custodians.

19 THE COURT: Ms. Chung.

20 MS. CHUNG: Your Honor, I don't think we're similarly  
21 situated on this. On defensive discovery, there have been  
22 enormous amounts of discussion about our custodians and we  
23 have, as a result of that, designated 111 people. And we have  
24 provided the information about who they are and what they do  
25 and the time periods. It's this information we haven't been

1 able to get from defendants. But more fundamentally, we have  
2 put forward literally scores of people, and the issue that  
3 we're having on their side is, it's not being reciprocated. I  
4 think seriously -- I've been a part of these conversations --  
5 we have said a lot of things, including in meet-and-confers, to  
6 drill down on who the people are and why they're being added or  
7 not.

8 THE COURT: So, Mr. Woll, I am happy if you don't  
9 reach agreement with the plaintiffs and we're together again on  
10 Thursday afternoon, I am happy to look at the chart you gave to  
11 the plaintiffs in the past all those custodian identifications,  
12 and am happy to look at the chart you will produce tomorrow by  
13 5 for the plaintiffs and be able to observe whether or not the  
14 information you gave in the past was really fulsome enough. So  
15 I'd be happy to look at it now if you have a copy, but there is  
16 no expectation you would have brought it to court.

17 MR. WOLL: I'm not sure I do, your Honor.

18 THE COURT: Yes.

19 MR. WOLL: And with respect to the plaintiffs, can you  
20 also look at their chart and see whether it provides  
21 information?

22 THE COURT: I'd be happy to. I'd be happy to.  
23 Everybody should bring their charts.

24 MR. WOLL: Thank you.

25 THE COURT: So on this third letter, I think nothing

1 is resolved. I think everything remains open to a  
2 meet-and-confer process this week. And it's on the agenda for  
3 Thursday.

4 MS. SHANE: Your Honor, I'm sorry, if I may just a  
5 moment confirm that our understanding, which we had with the  
6 plaintiff before we came here and which I believe was mentioned  
7 at the start of this conversation, is that this JPM defendant  
8 and the plaintiff had an agreement resolving this issue as to  
9 JPM.

10 MS. CHUNG: Yes, your Honor. We set aside JP -- I  
11 think I did in this conversation.

12 MS. SHANE: Thank you.

13 THE COURT: Thank you.

14 MR. HANIN: Excuse me, your Honor. Michael Hanin on  
15 behalf of FHFA. With respect to the four cases that were not  
16 the subject of the letter you received last week, we had not --

17 THE COURT: What four cases?

18 MR. HANIN: Well, the letter you received from FHFA  
19 related to 12 of the 16 cases coordinated before you. We  
20 suspect that in the four cases that our firm is handling, we  
21 would continue to meet and confer on the very same issues that  
22 the other 12 defendants were dealing with. And we actually had  
23 meet-and-confers on each of those cases scheduled for tomorrow  
24 and Wednesday. And so I just wanted to make sure of two  
25 things: one, that we would also receive from the defendants the

1 same list of custodians who they believe are appropriate for  
2 post-securitization searches by 5 p.m. tomorrow, and, two, that  
3 with your Honor's permission, we could in the course of these  
4 meet-and-confers, in which we have requested all the same  
5 searches that FHFA requested in all of the cases, get on the  
6 same timetable such that to the extent there are any  
7 outstanding issues by the close of business Wednesday we can  
8 address them with your Honor on Thursday.

9 THE COURT: Yes.

10 MR. HANIN: Thank you.

11 THE COURT: Sadly I thought there were four cases that  
12 were moving along without any need for intervention. OK.

13 Let's talk about the RBS litigation.

14 Thank you very much for your submissions to Judge  
15 Thompson and myself. And, Mr. Woll, I'm glad you're here.

16 MR. WOLL: And I'm glad my partner, Tom Rice, is here.

17 THE COURT: I had spoken with Judge Thompson months  
18 ago and again last week and again today, and I'm very aware  
19 that he is the judge responsible for the Royal Bank of Scotland  
20 case filed in Connecticut. And I have enough on my plate and  
21 that's just fine. But I think what I have in mind with respect  
22 to the coordination order is something that is, I think, pretty  
23 common in litigation across districts. And it's agreements  
24 along these lines, that no deponent will be deposed twice, that  
25 documents produced in the litigation before me will be produced

1 in Connecticut and vice versa to the extent that that's  
2 relevant. So I expect that that's extraordinarily standard and  
3 desired by one and all. I may be wrong about that. So I think  
4 the next layer of issues potentially for agreement or  
5 disagreement is whether or not the 20-deposition limit that's  
6 imposed in the 16 actions here, of all defendants vis-a-vis  
7 FHFA and FHFA vis-a-vis any corporate family, whether or not  
8 that will be deemed to be imposed with respect to the  
9 Connecticut litigation as well. And of course Judge Thompson  
10 will speak for himself. But RBS, at least one of the  
11 defendants in the RBS family who is a defendant in the  
12 Connecticut litigation is present before me in four cases, and  
13 I think two or three of those are fraud cases, not that they're  
14 defendants on fraud counts, but -- I have my chart. But  
15 anyway, so it's my understanding that Judge Thompson believes  
16 that that 20-deposition limit should apply with equal force to  
17 the Connecticut action. Therefore Royal Bank of Scotland, that  
18 family of corporations, will be involved in taking the no more  
19 than 20 depositions of the FHFA that binds all the defendants  
20 before me. And similarly, the plaintiff and any co-defendants  
21 should expect a 20-deposition limit of the Royal Bank of  
22 Scotland family of companies, whether they are named in the  
23 four actions here or the Connecticut action. So Royal Bank of  
24 Scotland, as a family of companies, is only going to face 20  
25 depositions, whether those depositions are taken as part of my



1 four cases or the Connecticut case.

2 Now, with respect to the Connecticut action, I think  
3 Judge Thompson would like to treat this -- and again, he will  
4 speak for himself as presumptive and give Royal Bank of  
5 Scotland and FHFA an opportunity to be further heard before him  
6 if and when they feel they feel there is a need for relief.  
7 But of course that applies here as well.

8 So with respect to the plaintiff's proposal that we be  
9 scheduling a trial date in the Royal Bank of Scotland case, I  
10 think I will leave summary judgment practice and trial dates to  
11 Judge Thompson and it doesn't need to be part of a coordination  
12 order.

13 Similarly with respect to document production in the  
14 Connecticut case and a substantial complete date or a cutoff  
15 with fact and expert discovery, I think Judge Thompson and I  
16 will meet and confer about that more. But I think  
17 fundamentally that's for Judge Thompson to decide. The issue  
18 is to what extent it will impact the management jointly of  
19 these 17 cases.

20 So I hope that gives you enough -- I wanted to respond  
21 as promptly as I could on behalf of both of us since you are  
22 before me today and it does affect your life going forward,  
23 because that means that Royal Bank of Scotland is going to have  
24 to be prepared to begin deposition discovery of FHFA in January  
25 of this year. It of course knows that for my four cases, but

1 it has to know that for the Connecticut case as well.

2 I think that there should be continuing consultation  
3 between the plaintiff and the RBS defendants, indeed all the  
4 defendants in the Connecticut case, document production issues  
5 and the scheduling of the RBS depositions. Those do connect  
6 with issues before me, but I don't want to say anything  
7 further. I think Judge Thompson and I would like joint  
8 proposals on that detail. So what I would like is a proposed  
9 coordination order that provides for no deponent being deposed  
10 twice, documents produced in one of the 17 litigations being  
11 produced in all, the 20-deposition limit being deposed. And I  
12 think then the other things which are customary in coordination  
13 orders -- and I don't understand there is any dispute about  
14 it -- which is signing on the confidentiality agreement and the  
15 other stipulations that have governed document production and  
16 otherwise helped you all manage your lives in this case that  
17 are customary.

18 Mr. Rice.

19 MR. RICE: Yes, your Honor. If I may just approach.

20 THE COURT: Sure.

21 MR. RICE: Thank you. And I don't propose to speak  
22 very long, your Honor. I just don't want to speak from the  
23 back of the room.

24 THE COURT: Sure.

25 MR. RICE: First of all, thank you, your Honor. And

1 just to be clear, first, we do appreciate your Honor's efforts  
2 here and we appreciate your communicating what Judge Thompson's  
3 view of the case is. We have asked Judge Thompson today in a  
4 letter to him when we sent him a courtesy copy of the papers we  
5 filed Friday, we asked him to please set a conference as soon  
6 as possible so we can talk to him about these issues. We want  
7 to proceed in a way that's sensible but that protects my  
8 client's rights at the same time. And I'm concerned, your  
9 Honor, that some of the things you've said today are perfectly  
10 fine and some of them really are a problem in terms of the  
11 substantive rights of the RBS defendants and the Connecticut  
12 defendants.

13 Sure, documents produced in all cases and depositions  
14 taken in all cases can be used in all cases, there's no  
15 question about that. We have no issue with that. We would  
16 like, if it were feasible, to have a rule that says deponents  
17 are only taken once in a case. The problem with that is, given  
18 where we are now, the RBS defendants on the 68 securitizations  
19 that are at issue in Connecticut will not be ready to take  
20 depositions in the first half of next year, which is when all  
21 the depositions of the FHFA witnesses are going to take place,  
22 so that we're going to have an issue there and we're going to  
23 have a problem there. And I hope your Honor will understand  
24 that. I hope equally that Judge Thompson will understand that.  
25 And we would like to try to get before him on that.

1           And frankly, your Honor, I'd like to try to get before  
2 him on that before we come to --

3           THE COURT: Before January.

4           MR. RICE: Well before January, your Honor, and  
5 certainly before your Honor and Judge Thompson enter any kind  
6 of coordination order. I think certainly my client has a right  
7 to be heard in Connecticut where the plaintiff brought this  
8 case, where the case is going to be tried. We have no, no  
9 interest in trying to duplicate things. But what your Honor  
10 has outlined causes huge and, I would submit, with all respect,  
11 unfair issues for the RBS clients.

12          THE COURT: So, Mr. Rice, could I get your cooperation  
13 to this degree; would you draft with FHFA a proposed  
14 coordination order that reaches agreement where you can and has  
15 competing paragraphs where there is no agreement so we can make  
16 the differences concrete in one document and/or -- yes, that's  
17 my request. Would you be able to do that.

18          MR. RICE: First of all, your Honor, I think you will  
19 always be able to count on me to cooperate, and, yes, of course  
20 we'll do that. We'll certainly work with them on that. I  
21 think having a competing order already gives us a basis to come  
22 up with something. There are a couple of areas at least in  
23 which we agree. There is obviously much about which we don't  
24 agree at this point.

25          THE COURT: OK. So I take it, though -- there are

1 some things that I could say with respect to the 20-deposition  
2 limit. But I very much appreciate that you have a separate  
3 right to be heard before Judge Thompson. And I certainly won't  
4 be entering any order before he has an opportunity to grant  
5 your request for a conference before him and before he is ready  
6 to sign. So I don't want to put any party in the uncomfortable  
7 position of wondering who is the person you should be obeying.

8 MR. RICE: Thank you.

9 THE COURT: So I think Judge Thompson and I agreed  
10 from our very first conversation that we would try to work  
11 cooperatively with each other. But I do want to be very  
12 respectful of his independent role over that 17-defendant case.

13 MR. RICE: Thank you very much, your Honor.

14 THE COURT: Yes.

15 MR. ABENSOHN: Your Honor -- I apologize.

16 THE COURT: Counsel.

17 MR. ABENSOHN: Yes, your Honor. Adam Abensohn for  
18 FHFA. And I'll be brief because we do certainly respect that  
19 Judge Thompson will ultimately draw out the issues in the RBS  
20 case.

21 THE COURT: In one of the five RBS cases.

22 MR. ABENSOHN: In one of the five RBS case, yes, of  
23 course, your Honor.

24 The only thing I would say with respect to defendants'  
25 opportunity to be heard by Judge Thompson is, to a large

1 extent, they have been heard by Judge Thompson, who ordered two  
2 months ago that discovery begin, quote/unquote, promptly. So  
3 much of the complaint we hear today from RBS, in my view, is  
4 self-created. My understanding is that they've got to begin  
5 document collection, they've got to begin document production.  
6 They have yet to begin any of the process despite this order  
7 outstanding for two months. And our concern frankly is that  
8 they are trying to create a scenario that makes it impossible  
9 to get coordinated, that makes it impossible to spare witnesses  
10 multiple depositions. And that is then what we are trying to  
11 prevent. And again I understand your Honor's guidance and will  
12 proceed on that basis.

13 THE COURT: And when did you serve the document  
14 demands in the Connecticut RBS case?

15 MR. ABENSOHN: I believe the document demands went out  
16 the day after the exchange of initial disclosures, so that  
17 would have been, I think, on the order of a week to two weeks  
18 ago.

19 THE COURT: Thank you.

20 MR. ABENSOHN: Thank you.

21 MR. RICE: With your Honor's permission, I just can't  
22 leave some of this unchallenged.

23 THE COURT: I thought I asked the right questions.

24 MR. RICE: You did, your Honor, and I appreciate is.  
25 But there's something else your Honor doesn't know. We were

1 before Judge Thompson in January of last year on a conference  
2 that talked about discovery in these cases. Mr. Abensohn was  
3 there. There wasn't a hint at that time that they were going  
4 to seek to somehow cram us into a schedule that was here,  
5 absolutely unfair, your Honor. And again, we'll be heard  
6 before Judge Thompson.

7 THE COURT: Good.

8 I think we can move on.

9 MR. ABENSOHN: OK. Thank you, your Honor.

10 THE COURT: Thank you so much.

11 I don't need to take much time. You can write me a  
12 letter. I think we still have two dates in the UBS summary  
13 judgment motion practice that you were going to meet and confer  
14 about, and I'd love to get those down. So if you could just  
15 send me a letter with those two dates.

16 The issue about the *Daubert* challenges, I would like  
17 the defendants, other than UBS, to advise the plaintiff by  
18 October 19 whether or not they were they are making any *Daubert*  
19 motion at this time to challenge the Cowan report. If not, as  
20 was true in the UBS case, their right to make a *Daubert* motion  
21 to challenge his report is waived to the extent it could have  
22 been made at this time. So it is without prejudice to filing a  
23 *Daubert* motion on additional opinions that may be expressed by  
24 the plaintiff's expert.

25 Obviously this early *Daubert* motion practice has been

1 necessitated by the enormity of the task that confronts all of  
2 us. It's not just the plaintiffs who will be doing a  
3 reunderwriting analysis of the sample. I have no doubt that  
4 the defendants will be doing that as well. And the defendants  
5 will be deciding whether or not they want to make a  
6 counterproposal or look at additional files of everything.  
7 Unless we have devastating e-mails that come in as straight  
8 admissions with respect to the Section 11 violations, an  
9 enormous amount of work by the plaintiff and defendants is  
10 going to be driven by the plaintiff's protocol for choosing  
11 this sample and by the identification of the individual loan  
12 files. All of you need to know now whether this sampling  
13 protocol is so fatally flawed that it should be stricken on  
14 *Daubert* grounds. You all have the right, of course, to make  
15 any arguments to a jury about weight at any time. That  
16 wouldn't be appropriate for a *Daubert* motion. And of course  
17 you can't make a *Daubert* motion with respect to something you  
18 don't have. So to the extent that there are additional  
19 opinions and expert reports, you have all your rights to make  
20 additional *Daubert* challenges at that time.

21           So by October 19th you'll advise the plaintiff in  
22 writing whether or not you're making a *Daubert* challenge. And  
23 if you do, here is the briefing schedule: Motion by the  
24 defendants October 26, opposition November 9, reply November  
25 16. Two courtesy copies to the Court.



1 Counsel.

2 MS. DAVIDOFF: Your Honor, Amanda Davidoff from  
3 Sullivan & Cromwell. We certainly agree that we can't make a  
4 *Daubert* challenge based on information that we don't have yet.  
5 And speaking on behalf of the nine UBS defendant, we did  
6 receive our Cowan report last week. What's missing from that  
7 report -- that report includes a general methodology, it  
8 includes a list of about 44,000 loan members that are included  
9 in the sample plaintiffs said they drew. What's missing is all  
10 of the data one would need to evaluate whether the sample was  
11 reliably drawn based on the methodology that plaintiff has  
12 presented.

13 Now, it's quite a complicated process to adequately  
14 draw a sample based on general methodology. It's not take the  
15 loan tapes, close your machine, the sample pops out. The loan  
16 tape have to be processed. Dr. Cowan's report says that he  
17 divided them into four side by side. That's probably a lot of  
18 calculation, copying and pasting Excel charts. And Dr.~Cowan  
19 had to choose a number generator. That's going to usually  
20 generate a number between 0 and 1, a series of random numbers  
21 between 0 and 1. You need a computer program that maps those  
22 random numbers onto the loan numbers. Dr. Cowan says that he  
23 did a number of tests of representativeness. We don't have any  
24 of the backup data for those. And then of course overall, we  
25 do not have any discussion and information of how many times

1 they did this process, whether this was something they did once  
2 and took a sample or whether it's something they did a thousand  
3 times and took a thousand samples.

4 So we would submit, your Honor, a couple things in  
5 response to their proposal. We are more than happy to make a  
6 determination of whether we're going to make a *Daubert* motion  
7 on a relatively expedited basis. But that can't be done until  
8 we have this backup information. We've asked for it, not only  
9 what's automatically required under the rules; it's also the  
10 subject of a document request. We also asked for it in  
11 response to the motions letter that we got from the plaintiff  
12 last week.

13 So I would say that probably October 19 is too soon to  
14 make a determination about whether the defendants are going to  
15 make a *Daubert* motion. Plaintiffs have had these loans tapes.  
16 Your Honor's order had an outside date of June 8 for getting  
17 the loan tapes. There was a lot of back-and-forth on what the  
18 right loan tape was for each securitization. Plaintiffs  
19 themselves have said that they had to supplement the loan tapes  
20 with data for logic. Defendants certainly had a right to  
21 evaluate how that was done. They took from June until October  
22 to give us our sample numbers. And the samples are, you know,  
23 there are still a lot of numbers. There were 44,000 loans,  
24 there were a hundred loans for each securitization. It's going  
25 to take our experts some time to crunch those numbers once we

1 get the data that we need to evaluate a response to this  
2 proposal.

3 Presumably, if that's the kind of early *Daubert* motion  
4 your Honor has in mind in order to vet these numbers -- of  
5 course let UBS speak for themselves. They may want the same  
6 discovery. I'm not aware of whether they got it or not. But I  
7 don't think we can make a decision by October 19, given that  
8 it's October 15 and we don't have this data.

9 I also don't realistically think we could put in a  
10 motion on such a short time frame. It's just so many loans and  
11 there's some expert work to be done with these calculations.  
12 That's why it has taken such a long time to do.

13 THE COURT: Thank you so much.

14 MS. DAVIDOFF: Thank you.

15 THE COURT: The next topic will be the schedule for  
16 the reports on reunderwriting. As I understand it, to do the  
17 reunderwriting, the plaintiff needs the sample loan files. So  
18 for any particular case, the reunderwriting process requires  
19 that sample set to be complete. And I had proposed, I believe,  
20 at the July 31st conference the following schedule -- and just  
21 proposed -- that two months after the plaintiff has the sample  
22 loan files for a particular case and the underwriting  
23 guidelines, that it would identify for the defendants the  
24 results of its reunderwriting process to identify with some  
25 specificity what it contended the individual misrepresentations

1 or failings were. And I proposed that the defendants would  
2 then respond within six weeks.

3 So I just want to remind counsel of that discussion  
4 that we had on July 31 and ask you to fold that into your  
5 meet-and-confer process and come up with a schedule so we don't  
6 lose track of that. Thank you.

7 And I think that takes me to the last issue on my  
8 list, which is ResCap. I have not had an opportunity to read  
9 the entirety of Judge Glenn's decision. But I have read  
10 selected portions of it. And believe me, I will read it all  
11 with great interest as soon as I can. But I think I got the  
12 gist of it. And so I'd like to give counsel before me, who  
13 wish to be heard on this issue, and -- is it Mr. Goeke?

14 MR. GOEKE: Yes, your Honor.

15 THE COURT: Thank you. I'm so glad you're here.  
16 Anyone who wants to be heard on this issue, I want to give them  
17 an opportunity.

18 So what I'm thinking is ordering the production of, I  
19 think it's 2100 files, loan files now that FHFA has identified  
20 and requiring Ally to pay ResCap for that production. The  
21 issue is whether I allow defendants to identify any additional  
22 files beyond the 2100 and fold that in to my order. For  
23 instance, if the defendants could this week identify 500 or a  
24 thousand additional files that they would like ResCap to  
25 produce, I'd be happy to fold that in as well, if you think

1 that the set of 2100 is too small.

2 So that's going to be my proposal. And Mr. Goeke, you  
3 may wish to oppose that.

4 MR. GOEKE: Yes, your Honor.

5 THE COURT: I'll take any submission on Wednesday.  
6 The FHFA I'll take any submission on Friday. And Mr. Goeke,  
7 any reply on Monday.

8 MR. GOEKE: Thank you, your Honor.

9 THE COURT: Thank you.

10 So, counsel, two and a half hours later, it's 5  
11 o'clock. And by the way, I want to thank everybody for always  
12 being so prompt. It's greatly appreciated.

13 Mr. Goeke.

14 MR. GOEKE: Your Honor, I'm sorry to interrupt you.  
15 May I just ask, if we are to address this on Wednesday, on what  
16 authority are you actually ruling that we should be providing  
17 the information given that Ally does not have any control over  
18 this information? Is it under the shared services agreement or  
19 is it for some other reason? Just so we can be addressing the  
20 correct issue before your Honor.

21 THE COURT: I think you should assume that I'm going  
22 to act with every piece of authority I have at my command. And  
23 so that you should feel free to give me any and every argument  
24 why I should not order this.

25 MR. GOEKE: Thank you, your Honor.

1 THE COURT: Thank you.

2 MS. CHUNG: Your Honor, did you have some time in mind  
3 for the Thursday?

4 THE COURT: 2 o'clock.

5 MS. SHANE: Your Honor, is that in person or  
6 telephonic?

7 THE COURT: Well, it actually will depend upon the  
8 length of the agenda. I think this would have been impossible  
9 to do by phone. So either Ms. Shane and Mr. Kasner, the two of  
10 you together, and Mr. Selendy, if you would notify my chambers  
11 Thursday morning of the agenda items that have not been  
12 resolved through the meet-and-confer process and your  
13 recommendation, hopefully joint, as to whether or not this can  
14 be done by phone or -- I have to say, anything longer than 45  
15 minutes we're going to do in court. If we're down to one or  
16 two issues, fine. But for me to give everybody a chance to be  
17 heard and reflect on these and give you a ruling and perhaps to  
18 look at charts -- I'm so anxious to see Mr. Woll's charts and  
19 FHFA's charts -- document custodians, some of this, depending  
20 on what the issue is, it may of necessity be an in-person  
21 conference.

22 MR. KASNER: Your Honor, Jay Kasner. Good afternoon,  
23 your Honor. Just as a hypertechnical housekeeping matter, I  
24 will be in the Second Circuit Thursday morning. I will ask  
25 Mr. Fumerton to take responsibility and Ms. Shane for

1 contacting chambers if that's acceptable to the Court.

2 THE COURT: Thank you. Is it a case I know about?

3 MR. KASNER: Your Honor, it is a case I'm not certain  
4 you know about but it will be of interest to the Court. It  
5 involves an application of the same decision that your Honor  
6 discussed at our very first conference.

7 THE COURT: Thank you all.

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